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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SLINGER DRAINAGE,

Petitioner,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Federal Rule of Appellate Procedure 26(a) apply to limitation periods in Federal statutes, including the 30-day appeal period under 33 U.S.C. § 1319 (Clean Water Act) for seeking judicial review of a civil penalty, so that the first day of agency action is not included and if the last day of the period falls on a Saturday or Sunday, the period is extended to the following Monday?

2. For calculating the 30-day time period for seeking judicial review of an agency decision, including a Final Decision of the Environmental Protection Agency's Environmental Appeals Board assessing a civil penalty under the Clean Water Act, is the date the decision is "issued" the date appearing on the decision or the date the decision is sent to counsel and made available to the public?

3. Was Petitioner's appeal from an civil penalty assessment by a Final Decision of the Environmental Appeals Board timely, and did the Court of Appeals for the District of Columbia Circuit thus err and also fail to follow applicable case decisions including decisions of that Circuit, in dismissing the appeal for lack of jurisdiction as untimely?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Slinger Drainage, Inc., a nongovernmental corporate party to the proceedings before the Environmental Protection Agency and the United States Court of Appeals for the District of Columbia Circuit.

Slinger Drainage, Inc. here discloses that there are no parent corporations to Slinger Drainage, Inc. and there are no publicly held companies which own 10 per cent of more of Slinger Drainage, Inc.'s stock.

Respondent: United States Environmental Protection Agency.

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SLINGER DRAINAGE, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decisions of the District of Columbia Court of Appeals denying Petitioner's requests for rehearing and suggestion for rehearing *en banc* (No. 99-1433) are dated April 13, 2001. [Appendix D and Appendix E].

The decision of the District of Columbia Court of Appeals finding Petitioner's appeal was untimely and dismissing the appeal for lack of jurisdiction, is dated January 30, 2001. The decision is reported at 237 F.3d 681 (D.C. Cir. 2001). [Appendix A].

The Final Decision of the Environmental Appeals Board for the Environmental Protection Agency is dated September 29, 1999, but was sent to counsel and posted on September 30, 1999 (Hon. Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stien). (No. 5-CWA-97-022). The Opinion can be found on the EPA Web Site. [Appendix B].

The Initial Decision of the Environmental Protection Agency (Administrative Law Judge Edward J. Kuhlmann), finding Petitioner Slinger Drainage in violation of dredge-and-fill provisions of the Clean Water Act (Section 404) and assessing a civil penalty, is dated September 14, 1998. (No. 5-CWA-97-022). [Appendix C].

GROUNDS FOR JURISDICTION

Subject matter jurisdiction for the Court of Appeals was invoked under 33 U.S.C. § 1319(g)(8) (Clean Water Act, appeal from Class II civil penalty). The appeal was from a

Final Decision of the Environmental Appeals Board ("EAB") of the Environmental Protection Agency ("EPA") *dated* September 29, 1999 and *posted* September 30, 1999.

On October 14, 1998, Petitioner appealed to the EAB under 40 C.F.R. § 22.27(c) from the Initial Decision of the EPA (Administrative Law Judge), entered September 17, 1998. That Initial Decision found Petitioner violated the Clean Water Act Section 404 and assessed a civil penalty of $90,000 (*see* 33 U.S.C. § 1319(g)(2)(B), authorizing penalties up to $125,000). (Petitioner sought and was granted an extension of time to appeal to the EAB.)

On November 1, 1999, Petitioner appealed from the EAB Final Decision to the Court of Appeals for the District of Columbia Circuit. Under 33 U.S.C. § 1319(g)(8), an appeal of a Clean Water Act Class II penalty is taken to that Court "within 30 days beginning from the date of issuance of the final agency decision."

By Order of February 15, 2000, the Circuit Court on its own motion, inquired as to whether Petitioner's November 1, 2001 appeal from the agency Final Decision dated September 29, 2001, was timely. The Court issued a show cause order as to why the appeal should not be dismissed for lack of jurisdiction. On consideration of responses to the show cause order, the Court discharged that order, on June 12, 2000, directing discussion by the parties in their briefs as to timeliness of the appeal in addition to the merits. Briefs were filed and the matter was argued.

On January 30, 2001, the District of Columbia Circuit issued an Opinion determining Petitioner's appeal was untimely and dismissing the appeal for lack of jurisdiction. By order of the same date, the Court withheld issuance of the mandate until seven days after disposition of any timely filed petition for rehearing.

On March 15, 2001, Petitioner sought rehearing with a suggestion for rehearing *en banc*. On April 13, 2001, the Court denied rehearing and suggestion for rehearing *en banc*. A dissent was filed from the denial of rehearing *en banc* (Williams, J.). [Appendix D and Appendix E]. On April 20, 2001, Petitioner submitted a motion to stay issuance of the mandate, which was granted on May 11, 2001, the mandate withheld through July 13, 2001.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Under Supreme Court Rule 13.1 and 13.3, this Petition is filed within 90 days of the Court of Appeals decision of April 13, 2001, denying Petitioner's timely filed petition for rehearing.

STATUTE AND RULES INVOLVED

33 U.S.C. § 1319(g)(8)

Federal Rule of Appellate Procedure 26(a)

Federal Rule of Civil Procedure 6(a)

[Appendix F]

STATEMENT OF THE CASE

A. General Background and Description

In July, 1994, Petitioner Slinger Drainage, Inc. ("Petitioner" or "Slinger Drainage") performed tiling work on property owned by Mr. Dennis Shoup in Dodge County, Wisconsin. The project involved laying approximately 26,000 feet of tile under the soil, on approximately 50 acres of the northern portion of the site, which consists of more than 100 acres.

The tiling project, completed in that month, was intended to drain water collected in the tile into a ditch. The tile was installed by using a Hoes Trenching Machine, which places

tile in the ground by chainsaw type blade on a circulating chain to dig a trench. About 50 percent of the soil is replaced in the process and the remaining soil is placed momentarily on the side of the trench, but concave disks at the back of the trenching machine return this remaining soil to the trench in the same process. No soil or fill material was brought onto the site by Slinger Drainage. No soil or other fill material was removed from a non-wetland portion of the site and relocated into a wetland portion.

Slinger Drainage initially was contacted by letter of April 24, 1990 by the Corps of Engineers, informing it that the tile and trenching work had not been previously authorized under Section 404 of the Clean Water Act (CWA). The letter indicated that the work, without a Corps permit under the CWA, violated the Act (for Section 404 *see* 33 U.S.C. § 1344). In March, 1995, Slinger Drainage was served with an administrative compliance order requiring certain restoration activities for the site. Slinger Drainage complied with these requirements.

On November 22, 1997, EPA Region V filed an administrative complaint against Slinger Drainage for violating the Clean Water Act in not obtaining a permit before conducting the trench and tiling activity on the site. The complaint alleged the trenching process resulted in a "discharge" of pollutants into waters of the United States. A penalty of $90,000 was proposed. Slinger Drainage answered the complaint and denied that any Clean Water Act violation was involved.

Petitioner's denial of wrongdoing under CWA § 404 was based in part on the litigation in *North Carolina Wildlife Federation v. Tulloch* (No. C90-713-CV-5-BO, E.D.N.C. 1992). That litigation was initiated by environmental groups against the EPA, the Corps, and two landowners, alleging CWA § 404 violations as to landclearing and excavation

activities on that site. The matter was settled with an EPA agreement to amend regulations subjecting landclearing and excavation to further regulation.

The settlement agreement set out the text of the proposed rule, which was published on June 16, 1992. (57 Fed. Reg. 26,894 (1992)). On June 25, 1993, the EPA and the Corps adopted a final rule substantially identical to the proposed rule which was part of the *Tulloch* settlement. This "Tulloch" rule, as it is known, expanded the definition of a discharge of materials into navigable waters (prohibited by CWA § 404 unless the Corps has issued a permit for such activity) to include "any additional of dredged material into, including any redeposit of dredged material within the waters of the United States." Under this rule, a CWA violation can occur by any redeposit of dredged material which is "incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(1) and 40 C.F.R. § 232.2. By this regulation, a CWA permit is required for all mechanized landclearing, ditching, or channelization in wetlands.

Petitioner contends the *Tulloch* rule is too broad and impermissibly extends the reach of the EPA and the Corps into activity not resulting in the deposit of any material into navigable waters. Congress has not amended the CWA to reflect this *Tulloch* regulation, despite EPA's suggestion that it do so. Further, when the *Tulloch* rule was challenged in an action filed by certain trade associations, the United States District Court for the District of Columbia *invalidated* the rule, finding it exceed the agencies' CWA authority and issued a permanent injunction against agency enforcement of the *Tulloch* rule against the parties. *See American Mining Congress v. United States Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997) ("AMC"). That decision

was affirmed by the District of Columbia Circuit. *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("NMA").

On this basis, Slinger Drainage maintained that its tiling activity on the Dodge County site was not within EPA or Corps CWA jurisdiction and otherwise did not violate the Clean Water Act. Further, Slinger Drainage pointed out that the Hoes Trenching Machine used in the operation redeposits the soil into the trench, so soil movement is incidental to placing the tile.

However, the EPA ALJ in the Initial Decision found that the "redeposit of materials excavated from a wetland is the addition of pollutants under the CWA." *See United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985). [*See* Appendix C]. The ALJ applied the regulation and determined that the trenching activities by Slinger Drainage did violate the Act. According to the ALJ, the Slinger Drainage activity "was intended to, and did, change the use of the land from wetland to farmland." [*See* Appendix C at 56a-57a]. The ALJ also found the *Tulloch* rule and the later decisions of *AMC* and *NMA* were not involved, stating, "That rule was not at issue in this proceeding." Reviewing factors related to the penalty, the ALJ found appropriate a civil penalty of $90,000. [Appendix C at 57a, *et seq.*].

Slinger Drainage appealed to the Environmental Appeals Board (EAB). In a Final Decision *dated* September 29, 1999, the EAB affirmed the ALJ and the penalty figure. [Appendix B at 6a-46a]. The Final Decision stated "it is beyond cavil that the broad definition of 'discharge of dredged material,' 40 C.F.R. § 232.2, encompasses at least certain form of wetlands drainage activities that involve a discharge of dredged material." As stated in the regulation, "minor drainage expressly excludes conversion of wetlands

to non-wetlands, for the obvious reason that the drainage in that instance is patently not minor, given its effect on the wetland." *See* 40 C.F.R. § 232.3(d)(3)(ii).

The EAB reviewed the *Tulloch* rule in detail and the background and circumstances of drainage activities on wetlands. It also discussed at length the *NMA* decision. The EAB stated *NMA* involved an aspect of the *Tulloch* rule not at issue here, was intended to be a narrow ruling, and in any case emphasized concern over proper regulation of drainage or similar activities on wetlands. Thus, "it seems apparent that *NMA* is dealing with a distinctly different fact and analytical pattern than is presented in the case at hand." The EAB found the *NMA* decision did not control. [42a].

Reviewing other pertinent judicial decisions, the EAB further decided there was no regulatory or judicial impediment to affirming the ALJ's finding. The EAB thus found Slinger Drainage had violated the Clean Water Act and affirmed the $90,000 civil penalty.

B. Appeal Noted

Clean Water Act § 309(g) (*see* 33 U.S.C. § 1319) concerns administrative penalty orders, including judicial review. Under § 309(g)(5), an EPA penalty order "shall become final 30 days after its issuance unless a petition for review is filed under paragraph (8) or a hearing is requested under paragraph (4)(c)." (The hearing procedures of § 309(g)(4)(c) are not involved here.)

As provided by § 309(g)(8) (*see* 33 U.S.C. § 1319(g)(8)), a Class II penalty is appealed directly to the United States Court of Appeals for the District of Columbia Circuit. The appeal is taken "by filing a notice of appeal in such court *within the 30-day period beginning on the date the civil penalty order is issued.*" [Emphasis supplied]. *See* 33 U.S.C.

§ 1319(g)(8)(B). Petitioner contends the EAB decision was "issued" when it was *sent to parties* and *posted* or otherwise first made available to the public, not when the opinion is dated. Petitioner also contends the statutory language does not require that the actual date of issuance be counted when computing the 30 day appeal time period.

EPA regulations dealing with appeals of administrative penalty orders under the Act complement this approach. *See* 40 C.F.R. § 22.27. The initial decision of an administrative law judge "shall become the final of the Environmental Appeals Board within forty-five (45) days *after its service upon the parties*," unless either a party appeals to the full EAB or the EAB decides on its own to review the matter. § 22.27(c) [emphasis supplied]. Under an amendment to the regulation adopted before the EAB final decision was issued here (*see* Federal Register, Vol. 64, No. 141, July 23, 1999 at 40138, especially 40185-86), an initial decision appealed to the EAB "shall not be final or operative pending the Environmental Appeals Board's issuance of a final order."

As noted, the EAB's Final Decision was *dated* September 29, 1999. [6a]. However, the decision was not sent to counsel and was not posted on EPA's Web site, and thus first made available to the public, until the *following day*: September 30, 1999. Slinger Drainage therefore had 30 days from September 30, 1999, *not* including that date, to appeal to the District of Columbia Circuit. Although Petitioner could have filed its appeal sooner, under the circumstances the appeal was not filed until the last day.

Counting 30 days from *September 30* — which is the date Petitioner contends the EAB's decision was "issued" rather than the date appearing on the opinion of September 29, 1999 — and *not* including the September 30th date itself, the 30th day falls on the weekend of October 30-31, 1999.

Applying Federal Rule of Appellate Procedure 26(a), if the last day of the appeal time period falls on a weekend day or holiday, the last day becomes the next business day. Thus, the last day to file the appeal would be the following Monday, November 1, 1999. *That is the date on which Slinger Drainage's appeal was filed.*

C. Decision by District of Columbia Circuit

The merits of this appeal present critical questions of the extent of EPA and Corps authority over certain trenching or drainage activity in wetlands and the validity and scope of *Tulloch* rule. Nevertheless, the merits of this appeal were not reached by the District of Columbia Circuit. Observing that Slinger Drainage had appealed on November 1, 1999 from an EAB Final Decision dated September 29, 1999, the District of Columbia Circuit, on its own motion, raised the issue of a possible untimely appeal. The Court issued a show cause order and otherwise directed that the parties address in their briefs the issue of the timeliness of the appeal as well as the merits.

On January 30, 2001, the Circuit Court dismissed the appeal for lack of jurisdiction. [App. 1a-5a]. The Court determined the last day to file the appeal was Friday, October 29, rather than Monday, November 1. Noting this Court's decision of *Stone v. Immigration and Naturalization Service*, 514 U.S. 386 (1995) and *Missouri v. Jenkins*, 495 U.S. 33 (1990), the Circuit Court observed that judicial review provisions are jurisdictional and must be construed with "strict fidelity" to their terms.

The Court assumed without deciding that the EAB Final Decision *was* issued on *September 30, 1999* (rather than on the opinion's date of September 29, 1999), as Petitioner has contended. Yet, the Court still decided that the appeal was untimely, because it determined Rule 26(a) did not apply to

the statutory 30-day appeal time period. Thus the date of the decision *is* included in the 30 day calculation and the appeal period is not extended to the following business day if the last day of the period falls on a weekend day or holiday. The Court stated [App. 4a]:

> Rule 26(a), however, does not apply when Congress has specified a particular method of counting in the statute itself and there is no indication of a contrary congressional intention. This was evident in *United Mine Workers of America v. Dole*, 870 F.3d 662, 665 (D.C. Cir. 1989), where the court found that Rule 26(a) applied to the requirement in the Mine Act, 30 U.S.C. § 811(d) (1994), that a petition challenging a new standard be filed "prior to the sixtieth day after such standard is promulgated." The court explained that, because the cited statute made "no separate provision for the computation of time," "Congress intended its time periods to be computed in accordance with the federal rule." *United Mine Workers*, 870 F.2d at 665.

The Court stated that the Federal Rules are utilized in calculating a certain statutory time period in the absence of a statute-specific provision or indication by Congress in a given situation that it did not intend the rules to apply. *See Union National Bank v. Lamb*, 337 U.S. 38 (1949). In the present matter, "the statute currently before us clearly establishes a separate provision" for calculating the 30 day appeal time period. The appeal must be filed "within the 30-day period *beginning on the date the civil penalty issued*." 33 U.S.C. § 1319(g)(8)(B). [App. 5a, emphasis retained]. The Court stated "there is nothing to suggest that Congress did not intend precisely what it said in the statute."

Consequently, under this view of § 1319(g) the *date* of issuance of the EAB Final Decision (which the Court found to be September 30) *is* counted in the 30-day appeal period and the appeal must be filed "within" that period. Because Rule 26(a) does not apply, the appeal could not be filed on the following business day if the appeal period ends on a weekend or holiday. Under this approach, *the last day to file the appeal was Friday, October 29. An appeal filed Monday, November 1 would be too late.* Accordingly, the appeal was dismissed for lack of jurisdiction.

Petitioner sought rehearing and suggestion for rehearing *en banc*. Petitioner stated the Court's interpretation of § 1319(g) was too narrow, the decision contravened other decisions on the issue such as *American Federation of Government Employees v. Federal Labor Relations Authority*, 802 F.3d 47 (2d Cir. 1986), and was contrary to other District of Columbia Circuit opinions, such as *United States v. Carver*, 671 F.2d 577 (D.C. Cir. 1982).

On April 13, 2001, the Circuit Court denied the petition for rehearing and for rehearing *en banc*. [App. 66a-68a]. The Court stated *Carver* did not control because that case "did not address the question presented here—a statutory judicial review provision in which Congress has mandated a particular method of counting." The Court also stated another D.C. Circuit unreported opinion, *National Federation of Federal Employees, Local 1300 v. Federal Labor Relations Authority*, did not control because it did not deal with the same question and was unpublished.

There was a dissent from the decision denying the petition for rehearing *en banc* (Williams, J.). [App. 69a-71a]. The dissent said the statute and Rule 26(a) can be put together "by saying that the substantive statute identifies the 'day that begins the period' as the issuance date; Rule 26(a) tells us to exclude that day." The dissent noted *American Federation*

to the effect that the 60 day period considered by that court was found to begin on the date the order is issued "but does not direct that the *date of issuance* be counted as part of that period." [App. 71a, emphasis retained].

Petitioner now seeks review by this Court.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA ERRED WHEN IT DETERMINED THAT PETITIONER'S APPEAL FROM THE FINAL DECISION OF THE EPA ASSESSING A CIVIL PENALTY UNDER THE CLEAN WATER ACT WAS UNTIMELY.

This matter presents significant issues of concern to this Court in its role of providing oversight and guidance in applying the Federal Rules. Not only did the District of Columbia Circuit err in ruling Petitioner's appeal was untimely, but also the related questions of computing statutory time periods and the application of Federal Rule of Appellate Procedure 26(a) have been the subject of differing conclusions by other Federal courts. This Court should grant this petition to clarify that Rule 26(a) applies to statutory time limits for appeals to Federal courts from administrative agencies, that the Rule applied here, and thus that Petitioner's appeal to the District of Columbia Circuit from the agency decision assessing the Clean Water Act Class II civil penalty was timely.

Petitioner requests that this Court clarify two central considerations:

1. Rule 26(a) applies to computing statutory time periods in Federal statutes, including the 30-day time period in 33 U.S.C. § 1319(g)(8) for seeking judicial review of a final

agency decision assessing a civil penalty, which states the appeal is to be filed "within 30 days beginning on the date the civil penalty order is issued."

2. The date that an agency decision is "issued" for purposes of computing the appeal time period is the date that the decision is first sent to counsel and made available to the public, not the date of the decision itself, if those dates are different.

A. Application of Rule 26(a)

If Rule 26(a) applies to the appeal period under § 1319(g)(8), then the date *of* "issuance" of the penalty order is *not* counted. The statute's language "beginning on the date the civil penalty order is issued" is viewed as *setting* the starting date for the time period but *not requiring that such date be included* in the calculation. Also, if Rule 26(a) applies and the *last* day of the period is a weekend day or holiday, the appeal is timely if filed the next business day.

There was no reason not to apply Rule 26(a) to this appeal period. The Rule can apply to the 30-day appeal time period in § 1319(g)(8) without violating any statutory intent or purpose. The date of issuance of the civil penalty order is not counted in computing the appeal period and the last filing day is the following business day if the last day of period falls on a weekend day or holiday. The Final Decision assessing the Class II civil penalty was "issued" on September 30, 1999 (as the Circuit Court correctly determined). If so and if Rule 26(a) applies, Petitioner's appeal filed on November 1, 1999 is timely.

It appears this Court has not recently ruled upon the specifics of applying Rule 26(a) to appeal time periods or decided on what date a certain administrative order is deemed

"issued" for purposes of computing such time periods. But decisions of this Court indicate that applying Rule 26(a) is not precluded here.

In *Jones & Laughlin Steel Corporation v. Gridiron Steel Co.*, 383 U.S. 32 (1965), this Court applied Federal Rule of Civil Procedure 6(a) (similar to FRAP 26(a)), to find that the last day of an appeal period (under 28 U.S.C. § 2107) was the following business day when the last day fell on a Saturday, *despite the fact that the Court of Appeals had directed the clerk's office to be open for business on Saturday mornings*. The Court clearly indicated by this statement that the Federal Rules provisions for computing time periods are to be applied comprehensively for the benefit of litigants. A similar statement by this Court is found in *Street v. United States*, 133 U.S. 299 (1890) (power to be exercised or action to be taken up to and including a given day of a month, may be exercised on the succeeding day if the last day falls on a Sunday).

In *Burnet v. Willingham Loan and Trust Co.*, 282 U.S. 437 (1931), in a tax matter, the Court considered the time within which, after the date of filing of an income tax return, an additional assessment may be made. The relevant language was "within five years after the return was due or was made." This later was amended to four years. The Court held that in computing the time period, the day on which the event happened is to be *excluded*. The Court commented, "The fiction that a day has no parts is a figurative recognition of the fact that people do not trouble themselves without reason about a nicer division of time."

Further, in the often-cited decision of *Union National Bank v. Lamb*, 337 U.S. 38 (1949), this Court applied Rule 6(a) to the time period for appealing to this Court from a State supreme court under 28 U.S.C. § 2101(c). The Court found that under Rule 6(a) the last day for noting the appeal

can be the following business day, if the appeal time period expired on a weekend day or holiday. The Court noted:

> [Rule 6] provides the method for computation of time prescribed or allowed not only by the rules or by order of court but by 'any applicable statute.' Since the rule had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. § 2101(c). The appeal therefore did not fail for lack of timeliness.

Subsequently, in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court stated that statutes of limitations are to be interpreted with reference to other provisions of law. It noted that any limitation period "is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." It continued, "In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." 421 U.S. at 463-64.

Also, in *Hubbard v. United States*, 514 U.S. 695 (1995), involving whether a Federal court is a "department or agency" within the meaning of 18 U.S.C. § 1001 (prohibiting false statements in matter within jurisdiction of federal department or agency) this Court recently commented that courts should adopt a "straightforward" interpretation of statutes. *See* discussion at 514 U.S. at 700-702.

General principles for computing time and applying the Federal Rules are consistent with these indications by this Court. As stated in Wright & Miller, *Federal Practice & Procedure*, § 1162, when computing any period of time other

than periods of less than eleven days, "under the Federal Rules of Civil Procedure, the local rules of any district court, an order of court, *or any applicable statute*, the day of the act, event, or default from which the period begins to run is excluded." The last day of the period is included, "unless it is a Saturday, Sunday, or legal holiday, in which case the period is not completed until the end of the next day that is not a Saturday." *See Frey v. Woodard*, 748 F.2d 173 (3d Cir. 1984) (administrative claim under Federal Tort Claims Act was timely when filed the next business day after the Saturday on which the appeal period expired, even though office to which claim was presented was open for business on Saturday), and *Prince v. United States*, 185 F. Supp. 269 (D.C. Wis. 1960) (time period under 28 U.S.C. § 2401(b) as to time limit for filing tort claim against United States, day of act or event is excluded).

Concerning applying Rule 6(a) to statutory time periods including periods of limitation, Wright & Miller (*see* § 1163) further note that while there is authority to the contrary among the Federal courts, the majority rule is to apply Rule 6 to exclude a weekend day or holiday from the time computation if the last day of the period falls on such a day. "This conclusion seems to be based on the premise that Rule 6 expresses the liberal spirit of the federal rules and their quest to avoid 'setting traps for the unwary' and that this spirit should be employed in construing statutes of limitations." An alternative argument is that "the computation provisions of Rule 6 inherently are fair and practical." In addition, "it has been said that the rule 'merely declares a rule of statutory construction having widespread judicial sanction, federal as well as state, rather than being an enlargement or modification of the time provisions to which it is applied.'" *Citing, e.g., Wilson v. Southern Railway Co.*, 147 F.2d 165 (5th Cir. 1945).

More to the point here, the Section adds,

> It is difficult to perceive how a legitimate governmental interest would be prejudiced by application of the Rule 6 exclusion of final Saturdays, Sundays, and legal holidays to federal statutes of limitations. This exclusion would delay the expiration of a given period by, at most, two or three days, which is unlikely to inconvenience or prejudice anyone.

In addition, "giving the scope of Rule 6 a broad interpretation would lead to a uniform system of computing time under all federal statutes, an objective that seems desirable."

These overriding principles should have been applied by the District of Columbia Circuit. It is difficult to find any expression of legislative policy in § 1319(g)(8) so strong as to prevent application of Rule 26(a) to the 30-day appeal time period, even if the statute states an appeal is to be filed "within" 30 days and the period begins "on the date the civil penalty order is issued." As pointed out by the dissent in the Circuit Court's order denying the petition for rehearing *en banc*, the statute and Rule 26(a) can be read together. The statute simply sets the time frame for the appeal, as the date the decision is issued. It does not expressly require that this date be included in computing the appeal time. Nor is there anything in § 1319(g)(8) *expressly* precluding application of Rule 26(a).

Other Federal courts considering statutory time periods generally have applied Rule 6(a) or Rule 26(a)'s provisions of not counting the initial day of an act or event from which a certain action is to be taken or of extending the last day for such action to the following business day if the time period falls on a weekend day or holiday. Such cases are numerous. *See, e.g., Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998)

(petition under Antiterrorism and Effective Death Penalty Act); *Allgood v. Elyria United Methodist Home*, 904 F.2d 373 (6th Cir. 1990) (generally); *Tribune v. United States*, 826 F.2d 633 (7th Cir. 1987) (six month limitations period for actions under Federal Tort Claims Act, which is to run from day agency denies claim, is counted from day after agency mails its final denial of claim, to day before the same calendar date six months later); *Moore v. United States*, 173 F.3d 1131 (8th Cir. 1999) (also under the AEDPA), and *Bailey v. Faux*, 704 F. Supp. 1051 (D.C. Utah 1989) (applying Rule 6(a) to Miller Act time period).

It would be of particular concern to this Court, as to the District of Columbia Circuit's decision, that the decision contravenes not only decisions of other Federal courts applying Rule 26(a) (or Rule 6(a), for that matter) to statutory time periods, but also contravenes other District of Columbia Circuit decisions. In *United States v. Carver*, 671 F.2d 577 (D.C. Cir. 1982), the District of Columbia Circuit applied Federal Rule of Criminal Procedure 45(a) to the 18-month period of service for a grand jury. Here, denying the petition for rehearing, the Court distinguished *Carver* by stating the case did not involve a statutory time period "which has mandated a particular method of counting." Yet, there is *no* express statement in § 1319(g)(8) that the 30 day time period must be calculated differently from the standard means of calculating time provided in Rule 26(a).

In *United Mine Workers of America v. Dole*, 870 F.2d 662 (D.C. Cir. 1989), the District of Columbia Circuit found Rule 26(a) applied to the 60 day time period for challenging a new standard under the Federal Mine Safety and Health Act (30 U.S.C. § 811(d)). The statute requires any challenge to be filed "prior to the sixtieth day after such standard is promulgated." The court stated that time periods, including jurisdictional time periods, *are to be construed in accordance with the Rule*. The Court commented that the statute "makes

no separate provision for the computation of time and was enacted subsequent to the adoption of Rule 26(a)." Therefore, "Congress intended its time periods to be computing in accordance with the federal rule." *Citing Union National Bank, supra.* The *United Mine Workers* Court added, "Statutory provisions laying down time periods for taking appeal, like any other enactments, must be interpreted and applied by courts; in so doing we use the federal rules as guides."

Also, in *National Black Media Coalition v. Federal Communications Commission*, 760 F.2d 1297 (D.C. Cir. 1985), considering the time limit for appealing from orders of the FCC under 47 U.S.C. § 402(b), the District of Columbia Circuit found the appeal time period began to run from the date *following* the release date of the order at issue. The statute provides an appeal is to be filed "within thirty days from the date upon which public notice is given of the decision or order complained of." The release date of FCC order (refusing to designate for hearing an application for assignment of a television license) was August 17, 1983. The date of public notice of that order was August 18. The court found the first day for counting the appeal period was *August 19*. Also, since the appeal period fell on a weekend day (September 17), the last day to file the appeal was the next business day, September 19.

Along the same lines, in *Western Union Telegraph Co. v. Federal Communications Commission*, 773 F.3d 375 (D.C. Cir. 1985), the court considered a statutory provision requiring a petition for review of a final FCC order to be filed "within 60 days" after entry of the order. The court found the statute allowed for a "filing window." That is, the statute did not state a petition for review must be filed "no later" than 60 days after the entry. *See Waterway Communications Systems, Inc. v. Federal Communications Commission*, 851 F.2d 401 (D.C. Cir. 1988) (to the same effect).

Likewise, in *Horsehead Resource Development Company, Inc. v. Environmental Protection Agency*, 130 F.3d 1090 (D.C. Cir. 1997), the same Circuit Court determined, when considering the 90-day statutory time period for filing a petition for review of an EPA regulation under the Resource Conservation and Recovery Act (42 U.S.C. § 6976(a)(1)), that the time period creates a "filing window" and not a filing deadline. The court further stated that the "promulgation" of the regulation for purposes of the time period was the date the regulation appeared in the Federal Register. The "within" language of the statute was viewed as setting a filing window and not a deadline which would prevent any standard computation of the time period.

Other Federal decisions are in accord with these principles and underscore the incorrectness of the District of Columbia Circuit's decision here. The Second Circuit, in *American Federation Government Employees v. Federal Labor Relations Authority*, 802 F.2d 47 (2d Cir. 1986), considered the time period for review of final orders of the FLRA under 5 U.S.C. § 7123. The statute states an appeal is to be filed "during the 60-day period beginning on the date on which the order was issued." The court specifically considered whether, in computing the appeal time period, the actual date of issuance of the order is included. In the case before it, if the date of issuance was included, the appeal would not be timely. *Drawing on decisions of the District of Columbia Circuit (National Federation of Federal Employees, Local 1300 v. Federal Labor Relations Authority*, No. 85-1541 (D.C. Cir. 1985) (unreported)) as well as *Carver*, the *American Federation* court applied Rule 26(a) to the time period, finding that the statutory language does not prevent computing the time period by means of excluding the actual date of issuance of the order. The Court stated [802 F.2d at 48, citation omitted]:

> We agree with our District of Columbia circuit colleagues that a petition filed on the 60th day after the date of issuance of the FLRA's order should not be counted. The statute provides for a "60-day period," not 59 days plus some portion of the date of issuance. If, hypothetically, section 7123(a) provided for 1-day period, it seems clear than a filing on the next day after issuance would be timely.

The Court added:

> Indeed, it would offend our notions of both justice and common sense to hold that the actual amount of time available to petition for review was open to the vagaries of when during the day the authority issued its order. Therefore, unless we were to require that the period extended to the corresponding hour and minute of the next day — which undoubtedly would draw us into a morass of picayune challenges — the following day would be the first day in the calculation. Logically, then, the 60-day period here should be determined no differently.

More directly to the issues here, the *American Federation* court stated that the statute "declares that the 60-day period begins on the date the order is issued, but does not direct that the date of issuance be counted as part of that period." The Court held that Congress "did not mean to have the date of issuance counted in determining the timeliness of a petition for review under section 7123(a)." In so holding, "we note that our conclusion is in line with our own rules of appellate procedure, *see* Fed. R. App. P. 26(a), and comports with the traditional rule for computing periods of time, which excludes the day of the triggering event." *See generally*, *Maahs v. United States*, 840 F.2d 863 (11th Cir. 1988), stating Rule 6(a) (and presumably Rule 26(a), applies to all federal

statutes enacted or amended subsequent to promulgation of the Rules.

The Sixth Circuit, in *Bartlik v. United States Department of Labor*, 62 F.3d 163 (6th Cir. 1995), reviewed the time period for seeking judicial review of agency action (Tennessee Valley Authority) under the whistleblower provision of the Energy Reorganization Act (*see* 42 U.S.C. § 5851(c)(1)). The Act states that a petition for review "must be filed within sixty days from the issuance of the Secretary's order." *Vacating a previously-issued decision finding otherwise* (*see* 34 F.3d 365 (6th Cir. 1994), petition for rehearing *en banc* granted and initial decision vacated, *see* 34 F.3d 368), the *Bartlik* court applied Rule 26(a) and found the appeal was timely when filed on the following business day if the appeal period expired on a weekend day.

In so doing, the Court expressly overruled other Sixth Circuit decisions to the contrary. *See Rust v. Quality Car Corral, Inc.*, 614 F.2d 1118 (6th Cir. 1980) (statute of limitations begins to run on actual day of event and not day following event day); *In re Butcher*, 829 F.2d 596 (6th Cir. 1987), *cert. den.*, 484 U.S. 1078 (bankruptcy statute of limitations ran for exactly two years and could not be extended by rule excluding weekend days), and *Hilliard v. United States Postal Service*, 814 F.2d 325 (6th Cir. 1987) (thirty day limitations period could not be extended by rule excluding weekend days). The Court *Bartlik* stated plainly [footnote omitted, but *see* n.1 stating that the distinction between "jurisdictional" and "procedural" limitations periods "is no longer meaningful"]:

> We now believe that our previous understanding of the effect of Civil Rule 6(a) on a "jurisdictional" statute of limitations, as explained in *Rust*, *Butcher*, and *Hilliard*, is erroneous. We now hold that the application of

> Appellate Rule 26(a), and likewise its counterpart Civil Rule 6(a), to calculate a limitations period does not 'expand' or 'enlarge' our jurisdiction. Both of these rules do nothing more than provide the court and the parties with a means of determining the beginning and end of a statute of limitations prescribed elsewhere in law.

The *Bartlik* court reviewed other authorities so holding (*see, e.g., Dole, supra*), noting that its conclusion was reached by a "straightforward and commonsense reading" of the Rules. The Court noted that Rule 20 states "all provisions of these rules are applicable to review or enforcement of orders of agencies." It added:

> Because proposed federal procedural rules are sent to Congress by the Supreme Court prior to their enactment, we must assume that Congress understood that the filing deadline for a petition for review of an administrative agency decision would be the first business day following the day the petition was due if the due date fell on a Saturday, Sunday, a legal holiday, or if the courthouse was closed for reasons listed in the rules.

Therefore, the court concluded,

> [g]iven the longstanding and realistic view of the relationship between statutes of limitations and procedural computational rules, we believe that Congress did not intend to negate the operation of Appellate Rule 26(a) here, absent a clear and unambiguous statement that this rule does not apply to the calculation of a particular statute of limitations period.

If Congress is to negate the application of the Rule within the "mandatory" nature of a statute of limitations language, "it will have to expressly communicate this desire."

Finally the *Bartlik* Court stated, applying Rule 26(a) generally to review of agency actions "is consistent with the intent of Congress to expedite the review of agency decisions." Agency implementation of the decision "is not meaningfully delayed" by applying Rule 26(a) to compute the time period involved "and the agency is not prejudiced." Considering that courts are not open 24 hours a day and seven days a week, "Congress has recognized that filing deadlines must be calculated in a realistic, practical matter."

In *Littrell v. Shalala*, 898 F. Supp. 582 (S.D. Oh. 1995), the court applied Rule 6 to the time period for objecting to a magistrate's report in a Social Security disability case. It utilized the day the report was filed as the "day of the act or event" for purpose of the time period *but excluded* that day, as provided by the Rule, and allowed for three days for mail service. The day of the report was October 21 (1994). The court began counting the 30 day period on October *22* and added three days for mail service, thus concluding that the 30 day period began running on October 24. Thus, consistent with a fair and appropriate application of these rules, the court *excluded* the *actual* date of the order of action when calculating the time period. *And see Environmental Defense Fund v. Thomas*, 657 F. Supp. 302 (D.D.C. 1987) (Rule 6(a) applied to considerations of statutory time period for seeking review of agency action).

Therefore, District of Columbia Circuit here contravened indications by this Court, general principles, its own decisions, and decisions of other Federal courts in finding that Petitioner's appeal to that Court under 33 U.S.C. § 1319(g)(8) from the final agency order assessing the CWA Class II penalty was untimely. The statute's language that

the appeal is to be filed "within 30 days beginning on the date the civil penalty order is issued" does not preclude application of Rule 26(a) to computing the time period. Thus, the time period began on the next day *after* issuance of the order, not on the date of issuance of the order, and the time period is extended to the next business day if the last day of the time period falls on a weekend day or holiday.

However, not all Federal courts consistently have applied these principles. *See, e.g., Reid v. Universal Maritime Service Corp.*, 41 F.3d 200 (4th Cir. 1994) (Rule does not apply to 10-day period in statute); *Lee v. United States*, 977 F.2d 551 (11th Cir. 1992), *cert. den.*, 510 U.S. 890 (determining time period for absent without leave in military context, standard military method of counting the first day of absence applied rather than Rule 6(a)); *Anonymous Banks One Through Three v. FDIC*, 645 F. Supp. 706 (D.C. Mont. 1986) (Rule 6(a) did not apply to 10 day limitations period for challenging temporary cease and desist orders of FDIC).

Thus, this Petition presents significant questions of computing time periods which will determine the rights of litigants not only in Clean Water Act penalty assessment situations as here, but throughout the Federal system and regarding other Federal statutes. The fact that the District of Columbia Circuit's opinion is reported adds to the necessity of this Court's review of that opinion and its implications.

B. When Agency Decision is "Issued"

As to when the agency civil penalty order was "issued," for purposes of computing the appeal time period, the District of Columbia Circuit *was* correct in deciding the agency's Final Decision was "issued" on the date that it was *released* to the public (September 30) and not on the date of the decision itself (September 29). *See, e.g., Microwave Communications, Inc. v. Federal Communications*

Commission, 515 F.2d 385 (D.C. Cir. 1974) (appeal time period for review of agency order began on date order was released to litigants); *Southern Pacific Pipe Lines, Inc. v. Department of Transportation*, 796 F.2d 539 (D.C. Cir. 1986) (at n.1, deciding that court had jurisdiction in counting appeal time period from date that agency order is issued, as from date of public notice, and see cases cited); *Zaluski v. Immigration and Naturalization Service*, 37 F.3d 72 (2d Cir. 1994) (Board of Immigration Appeals's *mailing* of decision to attorney's address of record triggered 90-day period for filing petition for review following "issuance" of final deportation order); *Oedraogo v. Immigration and Naturalization Service*, 864 F.3d 376 (5th Cir. 1989) (similar decision as to date when petition for review begins), and *Chem-Haulers, Inc. v. United States*, 536 F.2d 610 (5th Cir. 1976) (date of entry of judicial order is to be recorded in official court docket before order is appealable and before appeal time runs).

However, clarification of this approach by this Court is also warranted, in that the District of Columbia Circuit merely assumed *without deciding* that the "issuance" date was the date the Final Decision was sent to counsel and released to the public. The Circuit Court was correct to so state, since a ruling otherwise would permit an agency to "embargo" a decision of a certain date, releasing it or sending it to counsel days later, and then contend that the appeal period ran from a time that the parties were not even aware a decision was made.

This Court's clarification of when an agency decision is "issued" for purposes of computing an appeal period or other similar limitation period, would reach a question which does not seem to have been decided by this Court in this context. Such a clarification would have far reaching impact in defining the rights and responsibilities of parties

proceeding under a host of Federal statutes and would put to rest an issue that surely will be variously interpreted by Federal courts.

The present situation presents an excellent opportunity to put to rest precise but yet substantial matters of concern to all litigants in the Federal system before both Federal courts and agencies. Petitioners urge this Court to take up these issues and clarify the necessity of applying Rule 26(a) to statutory appeal periods and limitation periods unless there is an *express* statement in the statute otherwise and clarify the "issue" date of an agency decision from which the crucial appeal time period is counted.

CONCLUSION

THEREFORE, Petitioner SLINGER DRAINAGE requests of this Court that it GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND DECIDED JANUARY 30, 2001

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 18, 2001 Decided January 30, 2001

No. 99-1433

SLINGER DRAINAGE, INC.,

PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT

On Petition for Review of Orders of the
Environmental Protection Agency

* * *

Before: EDWARDS, *Chief Judge*, SENTELLE and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

EDWARDS, *Chief Judge*: Slinger Drainage Inc. ("Slinger") seeks review of a final decision of the Environmental

Protection Agency's ("EPA's") Environmental Appeals Board. Slinger is in the business of installing drainage tile, and in this capacity used a Hoes Trenching Machine to install 26,000 linear feet of drainage tile over a 50-acre area. As a result, the EPA filed an administrative complaint against Slinger alleging that Slinger violated § 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a) (1994), by failing to secure a permit before discharging pollutant into wetland as required under § 404 of the Clean Water Act, 33 U.S.C. § 1344. The Administrative Law Judge found Slinger liable as alleged and assessed a Class II civil penalty of $90,000; the Appeals Board affirmed both the finding of liability and the penalty. *In re: Slinger Drainage, Inc.*, CWA Appeal No. 98-10 (Sept. 29, 1999), *reprinted in* Joint Appendix 39. Whatever the substance of Slinger's claims, this court has no jurisdiction to reach the merits in this case, because Slinger's notice of appeal was untimely.

In the case of an assessment of a Class II civil penalty, a party may obtain judicial review "by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued." 33 U.S.C. § 1319(g)(8)(B). The Supreme Court has explained that "[j]udicial review provisions . . . are jurisdictional in nature and must be construed with strict fidelity to their terms. . . . This is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, 'mandatory and jurisdictional,' . . . and are not subject to equitable tolling." *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 405 (1995) *(quoting Missouri v. Jenkins*, 495 U.S. 33, 45 (1990)). Under 33 U.S.C. § 1319(g)(8)(B), Slinger had 30 days to file its notice of appeal beginning on

the date the order issued. As a statutory provision defining the timing of review within a judicial review provision, this 30-day period is jurisdictional.

The parties disagree on when the Appeals Board *issued* its order. Slinger asserts that the order issued on Thursday, September 30, 1999; the EPA argues that the order issued on Wednesday, September 29, 1999. For the purpose of assessing our jurisdiction, we assume, without deciding, that Slinger is correct and the order issued on Thursday, September 30, 1999. Even accepting this assumption, however, Slinger's notice of appeal was not timely.

33 U.S.C. § 1319(g)(8)(B) specifies that the period for filing a notice of appeal runs for 30 days beginning on the day the order issues. This provision does not, however, indicate any rules regarding the treatment of weekend days, holidays, or other potential exceptions. As a result, we look to Federal Rule of Appellate Procedure 26(a), which provides that Saturdays and Sundays are counted within the filing period, unless the last day of the period falls on a Saturday or Sunday. In particular, Rule 26(a) directs that we "[i]nclude the last day of the period unless it is a Saturday, Sunday [or] legal holiday." Under this provision, the court must include intermediate Saturdays and Sundays in computing the 30-day period. Thus, starting with the date Slinger asserts the order issued, Thursday, September 30, 1999, the 30-day period ended on Friday, October 29, 1999. Slinger filed its notice of appeal to this court on Monday, November 1, 1999 — outside the legal time for filing its notice of appeal.

At oral argument Slinger asserted that Rule 26(a) governs how the 30-day period is computed. Were this the case, we would "[e]xclude the day of the act, event, or default that begins the period." FED. R. APP. P. 26(a). Thus, under Rule 26(a), we would not include the day the order issued, which would mean that the 30th calendar day fell on Saturday, October 30, 1999. Under this calculation, the 30th day for filing a notice of appeal would have been Monday, November 1, 1999, the day that Slinger filed.

Rule 26(a), however, does not apply when Congress has specified a particular method of counting in the statute itself and there is no indication of a contrary congressional intention. This was evident in *United Mine Workers of America v. Dole*, 870 F.2d 662, 665 (D.C. Cir. 1989), where the court found that Rule 26(a) applied to the requirement in the Mine Act, 30 U.S.C. § 811(d) (1994), that a petition challenging a new standard be filed "prior to the sixtieth day after such standard is promulgated." The court explained that, because the cited statute made "no separate provision for the computation of time," "Congress intended its time periods to be computed in accordance with the federal rule." *United Mine Workers*, 870 F.2d at 665. The court also noted the "continuing vitality" of the Supreme Court's reasoning in *Union National Bank v. Lamb*, 337 U.S. 38, 40-41(1949), namely, "that the federal rules of procedure can be relied on for interpreting a statutory time period in the absence of any more statute-specific provisions or indication that Congress did not intend the rules to apply." *United Mine Workers*, 870 F.2d at 665 n.2.

In this case, in contrast, the statute currently before us clearly establishes a separate provision for the computation of time: a person may obtain review by filing "within the 30-day period *beginning on the date the civil penalty issued.*" 33 U.S.C. § 1319(g)(8)(B) (emphasis added). And there is nothing to suggest that Congress did not intend precisely what it said in the statute. As a result, Slinger's notice of appeal was not timely, and this court has no authority to hear the merits of its claim. We dismiss the appeal for lack of jurisdiction.

APPENDIX B — FINAL DECISION OF THE ENVIRONMENTAL APPEALS BOARD, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY DATED AND DECIDED SEPTEMBER 29, 1999

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

CWA Appeal No. 98-10

In re:
Slinger Drainage, Inc.

Docket No. 5-CWA-97-022

[Decided September 29, 1999]

FINAL DECISION

* * *

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

Slinger Drainage, Inc. ("Slinger"), the Respondent in an administrative complaint proceeding instituted by the Water Division Director of Region V, U.S. Environmental Protection Agency ("EPA Region V"), is appealing from an initial decision in which the Presiding Officer found it liable, as alleged in the complaint, for illegally discharging a

pollutant, specifically, dredged soil and organic materials, into a wetland that is part of the waters of the United States. Section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a), prohibits this type of discharge unless it occurs in compliance with a permit issued by the U.S. Army Corps of Engineers (the "Corps") pursuant to section 404 of the Act, 33 U.S.C. § 1344. Slinger did not have a permit at the time of the discharge and had never applied for one. The Presiding Officer assessed a civil penalty against Respondent in the amount of $90,000.[1]

I.

Slinger is in the business of installing field drainage tile.[2] In this instance, the installation work was done at the behest of a farmer who sought to transform a wetland portion of his farm into a viable dryland crop production area.[3] The precise

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1. Civil penalties may be assessed administratively by EPA pursuant to section 309(g) of the CWA, 33 U.S.C. § 1319(g), against persons who violate, *inter alia*, the prohibition in section 301(a) of the CWA.

2. The names, dates, jurisdictional and other important factual details relevant to the complaint against Slinger are spelled out in the initial decision. Unless otherwise noted, we adopt the findings of fact in the initial decision. In addition, we note that in the proceedings below the parties entered into several factual stipulations. *See* Joint Stipulations of Fact and Regarding Documents, ("Stip") (filed May 12, 1998). The parties also stipulated to the "authenticity and admissibility" of 66 exhibits. *Id.;* Trial Tr. at 207.

3. We spell dryland as one word simply to place it on an orthographic par with wetland. The term "upland," in lieu of "dry

(Cont'd)

means by which Slinger installs drainage tile is highly relevant to the liability issue, since the means of installation help determine whether a prohibited "discharge" took place — an issue of central importance Slinger employs a "Hoes Trenching Machine," which, as part of a continuous and unified process, digs a trench, lays a continuous line of drainage tile in the bottom of the trench, and then redeposits the excavated material back into the trench. More specifically, the machine uses a "chainsaw-type blade" with a circulating chain on an arm to dig a trench into the wetland soil. The chain momentarily lifts the soil out of the ground to create a trench into which the tile is fed by the machine. Approximately 50 percent of the soil that is removed to create the trench is immediately dropped back into the trench, and the remaining 50 percent is left momentarily on the side of the trench. The machine then immediately pushes most of the latter quantity back into the trench with concave-type disks, which are attached to the rear of the machine. All of these steps are carried out as part of a unified process as the machine traverses the field.[4]

(Cont'd)
land" or "dryland," is sometimes used in the regulations to describe land that does not have wetland characteristics and is not part of the waters of the United States. *See, e.g.*, 40 C.F.R. § 232.3(d)(3)(i)(A).

4. According to the testimony of Mr. Charles Slinger, President and sole owner of Slinger Drainage, Inc., "most" of the 50 percent that remains briefly on the side of the trench "is put back in with concave disks behind the machine. What isn't is put in with a blade on a tractor." Trial Tr. at 183 (direct examination). On cross-examination, Mr. Slinger acknowledged that "small bits" of soil remain on the surface after the disks on the back of the machine
(Cont'd)

In this instance, the machine dug trenches to lay approximately 26,000 linear feet of tile over a 50-acre area of the farm. The trenches are thirteen inches wide and vary in depth from 4 to 6 feet. The tile itself is perforated and ranges from 4 to 6 inches in diameter, with the larger tiles running out from the perimeter drainage ditches (dug by another contractor prior to the tile installation), and the smaller ones running off of individual 6-inch tiles. The tile is laid out in a pattern best suited to take advantage of the flow characteristics of the terrain. The project was designed to convey water collected in the tiles into the perimeter drainage ditches and then into a nearby waterway known as the Town Ditch. Eventually, it was expected that the drained area would be transformed from a wetland into dryland.[5]

(Cont'd)
have forced the bulk of the material back into the trench. Trial Tr. at 211 (cross-examination). Based on a comparison of his testimony on direct and cross-examination, we deduce that any remaining "small bits" not returned to the trench by the concave disks on the machine are returned to the trench by the tractor blade. Our search of the record (including stipulations) has not turned up any evidence, notwithstanding the recollections of counsel for EPA Region V to the contrary. Oral Arg. Tr. at 43, of quantities of soil remaining on the sides of the trenches after the Hoes Trenching Machine and tractor blade complete their work.

5. Federal regulations define "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 40 C.F.R.
(Cont'd)

Appendix B

Neither Slinger nor the farmer applied to the Corps for a permit under section 404 of the CWA.

A.

The text of section 404(a) of the CWA reads, in pertinent part, as follows:

> The [Corps of Engineers] may issue permits, after notice and opportunity for public hearings[,] for the discharge of dredged or fill material into the navigable waters[6] at specified disposal sites.

33 U.S.C. § 1344(a). This provision of the Act operates under the umbrella of section 301(a), which makes it unlawful for

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§ 230.3(t). The wetland in this case has been identified by the State of Wisconsin as within a system that is important for purposes of stemming nonpoint source pollution of waterways and protecting wildlife habital associated with wetlands. Initial Decision at 4.

6. The term "navigable waters" is defined in the Act and has a meaning that extends well beyond what is traditionally embraced by the concept of navigable-in-fact waters. The subtleties associated with the meaning of the term need not be addressed in this decision, however, for Slinger does not dispute the status of the affected wetlands as meeting the definition. Stip. No. 15. It suffices to note that the Supreme Court has stated that Congress, in defining "navigable waters" as "waters of the United States," intended to "exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

any person to "discharge" any "pollutant" into waters of the United States except in compliance with certain enumerated provisions of the Act, one of which is section 404. The term "pollutant" is defined broadly in the Act and includes, but is not limited to, "dredged spoil * * * discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6). The term "dredged spoil" is not further defined in the Act, but the term used in its stead in the regulations, "dredged material," is defined as material that is removed "from" a body of water by means of excavation or dredging:

> "Dredged material" means "material that is excavated or dredged from waters of the United States."

40 C.F.R. § 232.2. Because Slinger does not dispute that it removed soil from a wetland by means of excavation (albeit only momentarily),[7] dredged material is unquestionably the pollutant at issue in the instant proceeding.

The term "discharge of a pollutant" is also defined in the Act, and is the principal, statutorily defined term at issue in this case:

> The term "discharge of a pollutant" * * * means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

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7. "The soil displaced at the Site by the Hoes Trenching Machine in July 1994 was composed primarily of organic soils." Stip. No. 6.

CWA § 502(12). 33 U.S.C. § 1362(12).[8] The term "addition," as it appears in the foregoing section of the Act, is not separately defined elsewhere in the statute or regulations.[9] The meaning of the term has assumed a prominent role in the case, for Slinger argues, both on appeal and below, that its tile-laying activities did not result in an addition of a pollutant to waters of the United States, and, hence, no discharge of a pollutant occurred requiring a permit under section 404.

The section 404 regulations replace the statutory term "discharge of a pollutant" with the context-specific term "discharge of dredged material," which the regulations in turn define as dredged material that is added back, or redeposited, "into" a body of water:

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8. The parties have stipulated that the Hoes Trenching Machine is a "point source," defined in section 502(14) of the Clean Water Act as including "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well [or] discrete fissure * * * from which pollutants are or may be discharged."

9. The Corps and EPA have shared responsibility for administering this section of the Act, with the Corps having general responsibility over permit issuance and EPA having the right to veto any Corps-issued permits. *See generally* CWA § 404(a), (c), (n), 33 U.S.C. § 1344(a), (c), (n). Although both are authorized to exercise certain enforcement powers, EPA has exclusive authority to institute administrative civil penalty proceedings under CWA § 309, 33 U.S.C. § 1319. The Corps and EPA have issued extensive regulations implementing and interpreting section 404 of the CWA. These regulations provide insight into the meaning of the statutory provisions, flesh out some of the terms, and have the force of law. As noted, however, they do not separately define the term "addition."

Appendix B

> [T]he term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following: * * * (iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

40 C.F.R. § 232.2; 33 C.F.R. § 323.2(d). Like its statutory counterpart, this regulation also does not define the term "addition"; however, the relationship between the regulatory definition of "dredged material" (material that is removed "from" a body of water by means of excavation or dredging) and the regulatory definition of "discharge of dredged material" (dredged material that is added back, or redeposited, "into" a body of water) does shed light on whether an addition to the wetland took place as the result of Slinger's activities. This relationship is addressed later in this opinion in the discussion of *United States v. Wilson,* 133 F.3d 251 (4th Cir. 1997), a case cited by Slinger in support of its position.

B.

The Presiding Officer found Slinger liable for discharging dredged soil and organic materials without first obtaining a permit from the Corps pursuant to section 404 of the CWA. He rejected Slinger's arguments that movement of soil and organic matter was not a discharge but only

incidental to the laying of the tile. Among other things, the Presiding Officer held that "[t]he redeposit of materials excavated from a wetland is the addition of pollutants under the CWA, *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985)"; and "the Corps of Engineers has consistently interpreted the CWA to require a permit for the type of activity found in this case." Initial Decision at 8. Further, he rejected Slinger's contention that the D.C. Circuit's ruling in *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) (hereafter "*NMA*"), was applicable to this case, observing that the material that Slinger excavated was not "incidental fallback" within the meaning of *NMA*. Very briefly — for *NMA* is discussed at length later on — the court in *NMA* affirmed a district court decision permanently enjoining EPA and the Corps from enforcing the so-called Tulloch Rule, 40 Fed. Reg. 45,008 (Aug. 25, 1993), which incorporated the "any redeposit" language into the definition of discharge of dredged materials.[10] The court

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10. EPA and the Corps subsequently revised the definition of discharge of dredged material to bring it into conformity with the *NMA* decision. The definition now reads in relevant part as follows:

> [T]he term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within [sic], the waters of the United States. The term includes, but is not limited to, the following: * * * (iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

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held that "by asserting jurisdiction over 'any redeposit,' including incidental fallback, the Tulloch Rule outruns the Corps's statutory authority." *NMA*, 145 F.3d at 1405. The Presiding Officer, in rejecting Slinger's argument that *NMA* was applicable, observed:

> Moreover, there is no evidence that Respondent [Slinger] removed the dredged material from the site and intended to leave only that [which] fell back into the waterway. All the soil which Respondent dredged or excavated was redeposited in the waterway.

Initial Decision at 6. Because he found that the redeposit was not incidental, as Slinger contends, the Presiding Officer concluded that the present case is distinguishable from the fact pattern considered in *NMA*.

C.

In support of its position on appeal that there was no discharge of pollutants because there was no addition of pollutants to the wetland, Slinger points to the fact that it did not bring any soil or other material to the work site, nor did it remove any soil or other material from a non-wetland portion of the site and relocate it to a wetland portion. Critical to its view of the case is "whether or not the soil disturbed in placing tile by use of a Hoes Trenching Machine is disturbed

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See Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 64 Fed. Reg. 25,120, 25,123. (May 10, 1999) (revising 40 C.F.R. § 232.2 and 33 C.F.R. § 323.2(d)).

in such a way as to fit within the definition of 'discharge' under the Clean Water Act. Regardless of whether the soils within a wetland fit within the definition as a 'pollutant,' there is no violation in this case if those soils were not 'discharged' into the wetland." Slinger App. Br. at 5. Further, "[p]lacing tile by use of a Hoes Trenching Machine does not add anything to the wetland. The Machine lays the tile and leaves. It brings nothing into the wetland and takes no part of the wetland and removes it to another part of the wetland." *Id.* at 6. Continuing, Slinger states, "[t]he soil moved by a Hoes Trenching Machine in placing tile, drops the soil or material excavated directly back into the same location in the same wetland. It cannot be said that this soil is an addition to the wetland." *Id.* at 7.

Slinger also argues on appeal that *NMA* effectively enjoins EPA from regulating the placement of tile by use of a Hoes Trenching Machine.[11] Slinger asserts that the redeposition of soil that takes place using the Hoes Trenching Machine is "incidental fallback," Trial Tr. at 8, i.e., "incidental" to the tiling project itself, Oral Arg. Tr. at 22, and is not regulable under section 404.[12] Accordingly, Slinger

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11. The Board granted EPA Region V's motion for oral argument in this case expressly to "assist it in its deliberations over the pivotal issue of whether the Agency has jurisdiction, under CWA section 404, over Slinger's wetland dredging activities in light of the recent decision in *NMA*." Order Scheduling Oral Argument (EAB, Mar. 12, 1999).

12. Nowhere in its appellate brief or at oral argument (or for that matter, in its brief before the Presiding Officer) does Slinger explain exactly why it believes *NMA* operates to "effectively enjoin" EPA and the Corps from requiring a section 404 permit when (Cont'd)

argues that the finding of liability by the Presiding Officer should be overturned. Alternatively, if the Board disagrees with it on the issue of liability, Slinger asserts that the penalty is "unconscionable" (but does not recommend a reduction by a specific amount).

On appeal, EPA Region V does not dispute the facts as described earlier and does not disagree with Slinger's assertions that it did not bring any material to the work site or remove any from the site to another location EPA Region V does however view the physical movement of the wetland soil that occurs during installation of the tile with a Hoes Trenching Machine as a process of excavation and redeposit — "substantial disturbance and redeposition of dredged material." EPA Region V App. Br. at 3. As described by EPA Region V, "Excavation by the machine involves the removal of soil which subsequently falls back to the ground, some into the trench and some to the sides of the trench. Most of the soils on the side of the trench are then replaced into the trench by discs on the back of the trenching machine. A tractor with an attached blade returns remaining excavated soil to the trench."[13] *Id.* at 2. EPA Region V argues that this

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installing drainage tile by means of a Hoes Trenching Machine. In addition, Slinger even appears to contradict itself on the question of whether it believes the installation produces "incidental fallback" as described in the Tulloch Rule and *NMA*. *Compare* Oral Arg. Tr. at 22 *with id.* at 25.

13. EPA Region V also maintains that "[a] portion of the excavated soils remains on the side of the trench." EPA Region V App. Br. at 2. This contention is not, as explained *supra* note 4, supported by the record.

process constitutes an "addition" and hence a " 'discharge of pollutants' under prevailing case law." *Id.* at 3. As for *NMA*, EPA Region V takes the position that "the facts of the *NMA* decision are clearly distinguishable from the facts in the instant matter, rendering the *NMA* injunction inapplicable to this matter." *Id.* In particular, EPA Region V contends that the court in *NMA* was concerned only about "incidental fallback," involving only small quantities of soil, whereas Slinger "redeposited the entire amount of excavated material (all 2900 cubic yards of it) into the wetland." *Id.* at 8. EPA Region V adds, "There is, moreover, nothing accidental about these redeposits. The material did not merely fall back on its own incidental to the act of excavation, but instead was first removed and then mechanically redeposited into the trench." *Id.* EPA Region V argues that the Presiding Officer's finding of liability and assessment of a $90,000 penalty should be upheld.

Before discussing the specific merits of Slinger's appeal, we turn first to a focused examination of EPA's and the Corps' regulatory authority over drainage of wetlands that are part of the waters of the United States. Overlaying this discussion is the statutory background discussed earlier, which premises regulatory jurisdiction on a discharge of a pollutant into waters of the United States and, in the case of discharges involving excavated or dredged materials, the section 404 permitting requirements of the Act.[14]

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14. As noted previously, section 404(a) of the CWA authorizes the Secretary of the Army to issue permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." A section 404 permit is mandated for discharges of dredged

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Appendix B

II.

EPA and the Corps have implemented section 404 of the Act by issuing regulations that describe, often in very general terms, the types of activities that are subject to the section 404 permitting requirement.[15] These activities are

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or fill material by operation of section 301(a) of the CWA, which declares unlawful the "discharge of any pollutant" by any person unless in compliance with certain specific provisions of the CWA, one such provision being section 404. The term "discharge of a pollutant" is defined by the CWA as constituting "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). The term "pollutant" is in turn defined by the CWA to mean, inter alia, dredged spoil, i.e., dredged material. CWA § 502(6), 33 U.S.C. § 1362(6).

15. Some commentors on the Tulloch Rule drew a distinction between activities and discharges, asserting that the Rule attempts to regulate activities, whereas the CWA only authorizes the government to regulate discharges. 40 Fed. Reg. 45,008, 45,011 (Aug. 25, 1993). EPA and the Corps rejected this contention, responding as follows:

> EPA and the Corps agree with the point made by these commentors that the presence of a "discharge" into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under Section 404. Based on the clear language in section 301(a) of the CWA, this has been the agencies' long-standing position, and we are not altering that view in this rulemaking. For the reasons explained in this preamble, the agencies believe that addition or redeposition of

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described both in terms of what they include and what they exclude, and are set forth in a lengthy definition of the term "discharge of dredged material." 40 C.F.R. § 232.2. The prime included activity is "[t]he addition of dredged material to a specified discharge site located in waters of the United States." 40 C.F.R. § 232.2. Examples of excluded activities are "[a]ny incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the U.S." (subject to a no-effects demonstration requirement in certain cases), and "normal farming * * * activities such as plowing, seeding, cultivating, *minor drainage,* and harvesting." *Id.* (emphasis added).

Drainage of wetlands is not explicitly mentioned as one of the activities that is included within the section 404 permitting requirement. Nevertheless, it is beyond cavil that

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> dredged material in the course of activities such as mechanized landclearing, ditching, channelization and other excavation meets the discharge requirement of section 301(a). Because this rule will only regulate activities where the jurisdictional prerequisite of a "discharge" is present, EPA and the Corps disagree with commentors who argued that this rule is outside the scope of the agencies' authority under Section 404.
>
> Commentors are therefore flatly incorrect that this rule would trigger Section 404 jurisdiction over a discharge based upon the environmental effect of the associated activity

Id.

the broad definition of "discharge of dredged material," 40 C.F.R. § 232.2, encompasses at least certain forms of wetlands drainage activities that involve a discharge of dredged material. This conclusion is the only reasonable inference to draw from the explicit *exclusion* of "minor drainage" in the statute from the permitting requirement. *See* CWA § 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A). The implementing regulations are premised with this conclusion in mind. For example, in defining exempted minor drainage, the regulations refer, inter alia, to "[c]onstruction * * * of upland (dryland) facilities, such as ditching and tiling" that are incidental to normal farming operations and that "involve no discharge of dredged or fill material into waters of the United States." 40 C.F.R. § 232.3(d)(3)(i)(A). As further provided in the regulations, minor drainage expressly excludes conversion of wetlands to non-wetlands, for the obvious reason that the drainage in that instance is patently not minor, given its effect on the wetland.

> (ii) Minor drainage in waters of the United States is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adequate to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming).

40 C.F.R. § 232.3(d)(3)(ii). The inference to be drawn from the foregoing exclusions from the minor-drainage definitions

is that the drafters of the regulations, as well as the statute, assumed that a section 404 permit would be required for all other drainage activities that result in a discharge of dredged or fill material into waters of the United States (hereafter sometimes referred to as "non-minor drainage"). As explained in the Senate Report.

> Minor drainage is intended to deal with situations such as drainage in Northwestern forests or other upland areas. The exemption for minor drainage does not apply to the drainage of swampland or other wetlands.

S. Rep No. 95-370, at 76 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326. There is little doubt that Congress was concerned over the loss of wetlands to agriculture and to land developers. *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) ("Congress recognized the importance of protecting wetlands").[16]

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16. Congressional interest in preventing the loss of wetlands is not limited to the CWA

> In order to combat the disappearance of wetlands through their conversion into crop lands. Congress passed a law known commonly as "Swampbuster." Food Security Act of 1985, Pub. L. No. 99-198, §§ 1201, 1221-23, 99 Stat. 1354, 1504-08 (codified as amended at 16 U.S.C. §§ 3801, 3821-24). This law did not make illegal the conversion of wetlands to agricultural use, but did provide that any agricultural production on a converted wetland would cause the farmer to forfeit his eligibility for a number of federal farm-assistance

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Appendix B

Requiring a section 404 permit in most instances for non-minor drainage of wetlands is a fairly unremarkable proposition in view of the language and structure of the statute and regulations. In fact, EPA and the Corps assume as much, for they have seen little need to adopt explicit regulations mentioning wetlands drainage. For example, in the two agencies discussion of comments on the Tulloch Rule, they expressed no need to promulgate additional regulations covering the placement of drainage tiles:

> One commentor indicated that the preamble [to the Tulloch Rule] should clarify that the excavation of wetlands to place drainage tiles should be regulated under Section 404 since this involves a discharge and destroys wetlands. *The excavation of wetlands to place drainage tiles is currently regulated under Section 404 unless such activities qualify for a Section 404(f) exemption.*[17] Activities that involve replacing existing field drainage tiles where the replacement does not increase the extent of drainage beyond

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> programs. Among the exemptions to provisions of Swampbuster is one for wetlands that had been converted to agricultural production before December 23, 1985. See § 3821(d). The farming of such previously converted wetlands does not make the farmer ineligible for benefits.

Gunn v. U.S.D.A., 118 F.3d 1233 (8th Cir. 1997)

17. *See infra* note 18 (discussing section 404(f)).

> that provided by the original tiling would generally qualify for such an exemption.

40 Fed. Reg. 45,008, 45,025 (Aug. 25, 1993) (emphasis added).

Notwithstanding the CWA's inclusion of certain non-minor drainage of wetlands within the section 404 permitting requirement, it is equally apparent that the means by which the drainage of a wetland is accomplished may have a significant bearing on whether or not a specific drainage activity will require a permit. A permit is only necessary if there is a "discharge" of dredged or fill material into the waters of the United States; if drainage is accomplished by means not involving a discharge of dredged or fill material, no permit is required. For example, draining a body of water by means of a pump has been held not to involve a discharge of dredged or fill material and, hence, not to require a permit pursuant to section 404 prior to starting the draining. *Save Our Community v. EPA,* 971 F.2d 1155, 1165 (5th Cir. 1992) ("[T]he deliberate draining of a swamp is not a discharge of fill material."); Comment, *Pumping With the Intent to Kill: Evading Wetlands Jurisdiction Under Section 404 of the Clean Water Act Through Draining,* 40 *DePaul L. Rev.* 1059 (1981). As explained by the court in *Save Our Community,* "[t]he existence of discharge is critical. The discharge must be of effluent or dredged or fill material." 971 F.2d at 1162. Accordingly, the court held "that the wetlands draining activity per se does not require a section 404 permit under the CWA, as only activities involving discharges of effluent [e.g., dredged or fill material] necessitate obtaining a permit." *Id.* at 1167.

Appendix B

EPA and the Corps concur, in general terms, with the decision in *Save Our Community*:

> Several commentors [on the Tulloch Rule] indicated we should regulate the pumping of water because pumping water from a wetland has the same effect as draining, and, according to the commentor, "the impact of draining would be considered an identifiable decrease" in functions and values of waters of the U.S. We believe that pumping water from a wetland or other waters of the United States would not, in and of itself, necessarily result in a discharge of dredged material. *See Save Our Community v. EPA*, 971 F.2d 1155 (5th Cir. 1992). * * * We do not believe that simply putting a pipe into a water of the United States, per se, would necessarily involve a regulated discharge.

40 Fed. Reg. 45,008, 45,025 (Aug. 25, 1993) (preamble to Tulloch Rule).

The test of whether a section 404 permit is required for a particular activity that takes place in, or impacts, a wetland obviously does not depend solely or, in some instances, even partially on the effects of the activity on the wetland, as the pumping example proves. With the exception of certain exempted activities (not applicable here),[18] the only

18. Pursuant to CWA § 404(f), certain discharges of dredged or fill material, for example, "minor drainage," 40 C.F.R. § 232.3(c), which does not change the character of the wetland, *see* 40 C.F.R.

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consideration — the regulatory *sine qua non* — is whether a discharge of dredged material takes place. This is not to say that the "effects" of a particular activity are of no concern. In a broad sense effects are the driving force behind the entire regulatory scheme to protect wetlands. Section 404 was enacted in 1972 as part of a regulatory scheme whose purpose was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 125. The Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985), upheld "the Corps' ecological judgment" that regulatory activities intended to protect waters of the United States must include adjacent wetlands, for they function under the same hydrologic cycle.[19] Nevertheless, the pivotal consideration for purposes of deciding whether an individual activity is or is not subject to the section 404 permitting requirement is whether a discharge of dredged material takes place.

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§ 232.3(b), are not prohibited. *See United States v. Huebner*, 752 F.2d 1235, 1241 n.9 (7th Cir. 1985) (agricultural exemptions from the section 404 permitting requirement are "narrowly defined activities" that "cause little or no adverse effects either individually or cumulatively"). In those instances, EPA and the Corps may look to the effects of the discharges in deciding what activities to exclude (exempt) from regulatory coverage, partly or completely. Slinger is not asserting entitlement to an exemption under these provisions of the Act and regulations.

19. Another court has noted, "Congress purposely included nonnavigable inland wetlands in the definition of navigable waters because of their importance in the chain of travel of toxic pollutants. 4 LEGISLATIVE HISTORY 928 (statement of Sen. Muskie)." *United States v. Huebner*, 752 F.2d 1235, 1241 n.9 (7th Cir. 1985).

Appendix B

III.

Clearly, the drainage of the wetland area by Respondent Slinger Drainage, Inc. was intended to transform a wetland into dryland and thereby destroy its wetland characteristics so that it would be suitable for dryland crop production. But the central legal issue, as noted above, is not whether the drainage resulted in the destruction of a wetland; it is whether the installation of drainage tile, by means of a Hoes Trenching Machine, resulted in the discharge of dredged material into the wetlands, thereby constituting a discharge of pollutants into waters of the United States and requiring a permit under section 404 of the CWA.[20] The case is one of first impression for the Board.

A.

The parties' positions on appeal have been shaped, in many respects, by their differing views on how the D.C. Circuit's decision in *NMA* impacts the present case. For that reason we will examine the court's opinion in some detail,

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20. Slinger does not so much dispute that the excavated material which the Hoes Trenching Machine redeposited was dredged material, that the Hoes Trenching Machine constitutes a point source, or that the area on which it conducted its filing work is a wetland. Rather, according to Slinger, "The actual issue is whether or not the soil disturbed in placing tile by use of a Hoes Trenching Machine is disturbed in such a way as to fit within the definition of 'discharge' under the Clean Water Act." Slinger App. Br. at 5. As further elaborated by Slinger, "The issue is not whether there was a discharge of 'foreign' materials into the wetland. The issue is whether or not there was a 'discharge' into a wetland." *Id.* at 5-6.

despite the fact that the holding presented there is, in our view, largely inapplicable to the case at hand.

NMA upheld a district court's invalidation of the Tulloch Rule,[21] a rule promulgated by the Corps and EPA in 1993 in order to eliminate a de minimis exemption under an earlier rule. The earlier rule defined the term "discharge of dredged material" to mean "any addition of dredged material into waters of the United States," but it also excluded "de minimis, incidental soil movement occurring during normal dredging operations." 51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986). The Tulloch Rule removed the de minimis exception and expanded the discharge definition to include "any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States."[22] 58 Fed. Reg. 45,008, 45,037 (Aug. 25, 1993). The rule was challenged immediately by trade associations whose members engaged in excavation and dredging activities and who were concerned that the rule covered incidental "fallback" of dredged material that occurs during normal dredging operations.[23] During

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21. The Tulloch Rule derives its name from the settlement of a case by the name of *North Carolina Wildlife Fed'n v. Tulloch,* No. C90-713-CIV-5-BO (E.D.N.C. 1992).

22. The Tulloch Rule defined "discharge of dredged material" to include "any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landelearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(1)(iii); 40 C.F.R. § 232.2(1)(iii).

23. *American Mining Congress v. United States Army Corps of Eng'rs,* 951 F. Supp. 267 (D.D.C. 1997).

dredging, soil and other matter are typically excavated from a site and then transported to some other location for disposal. The large shovels used in dredging operations inevitably produce a certain amount of "fallback," which is nothing more than residue from the shoveling that falls back into the dredge site in virtually the same location from which it was originally taken. It is apparently not possible or feasible to scoop material from the bottom of a body of water without having some of it fall back into the water.

The court of appeals in *NMA* took note of the inevitability of fallback and of the fact that section 404 does not, by its terms, apply to dredging and excavation per se; rather, it applies to the "discharge" of dredged and fill material. EPA Region V and the Corps, who were parties to the lawsuit, did not dispute these central findings. They confined their arguments to "redeposits" of dredged material, including incidental fallback, which they viewed as a discharge because fallback, according to the argument, represents an "addition" of dredged material to the waters. As related by the court of appeals in *NMA*,

> [A]ccording to the agencies, wetland soil, sediment, debris or other material in the waters of the United States undergoes a legal metamorphosis during the dredging process, becoming a "pollutant" for purposes of the Act. If a portion of the material being dredged then falls back into the water, there has been an addition of a pollutant to the waters of the United States.

145 F.3d at 1403. In support of their position, EPA and the Corps cited to several court decisions in which quantities of bottom material or wetland soils were removed (e.g., by means of excavation, dredging, landclearing, channelization, or ditching) from one location and redeposited in another, resulting in an "addition" of a pollutant to waters of the United States. *See, e.g., Avoyelles Sportmen's League v. Marsh,* 715 F.2d 897 (5th Cir. 1983) (landclearing of wetland by deliberately leveling sloughs filled with rainwater held to have constituted a discharge of fill material); *United States v. M.C.C. of Florida,* 722 F.2d 1501 (11th Cir. 1985) (propellers of tugboats cut into bottom of waterway and deposited bottom sediment on adjacent sea grass beds); *Rybachek v. EPA,* 904 F.2d 1276 (9th Cir. 1990) (placer miners excavated gravel from streambeds and, after extracting gold, discharged the leftover material back into the water); *Minnehaha Creek Watershed Dist. v. Hoffman,* 597 F.2d 617 (8th Cir. 1979) (construction of dams and riprap involved placement of material such as rock, sand and cellar dirt into jurisdictional waters).

The court did not question the analysis in these decisions but rather found them not particularly germane to the issue before it. Each involved a project entailing both excavation and significant redeposit rather than a project that had excavation as its goal but involved some incidental fallback. Thus, they were clearly distinguishable on the merits. *Avoyelles* did not involve a discharge of dredged material, but instead was concerned with discharge of fill material; *M.C.C. of Florida* was analytically similar to placement of excavated material at the side of a ditch, since the displaced material ended up on "adjacent" sea grass beds; *Rybachek*

offered more assistance to the agencies' position but was ultimately rejected because the *Rybachek* court "identified the regulable discharge as the discrete act of dumping leftover material into the stream after it had been processed," and thereby was distinguishable from incidental fallback, *NMA*, 145 F.3d at 1406; and *Minnehaha* "simply held that the construction of dams and riprap" were within section 404 purview because of the placement of material into the water.

Close examination of the holding in *NMA* reveals a deliberate effort by the court of appeals to fashion a narrow ruling. "We hold only that by asserting jurisdiction over 'any redeposit,' including incidental fallback, the Tulloch Rule outruns the Corps's statutory authority." 145 F.3d at 1405. It left open the possibility that the agencies might be able to draw a bright line between "incidental fallback on the one hand and regulable deposits on the other," specifically indicating that "a reasoned attempt by the agencies to draw such a line would merit considerable deference." *Id.* Despite the court's circumspection, certain themes nevertheless dominate its opinion and provide insight into its reasoning. First, it is absolutely clear that the court was ruling that incidental fallback did not constitute an "addition" of a pollutant to waters of the United States. It remarked, for instance, that the Tulloch Rule encompassed "a wide range of activities that cannot remotely be said to 'add' anything to the waters of the United States." *Id.* "Without * * * an amendment [to the statute to address the presence of the 'addition' language in the definition of discharge], the Act simply will not accommodate the Tulloch Rule." *Id.* at 1410. "We agree with the plaintiffs, and the district court, that the straightforward statutory term 'addition' cannot reasonably

be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* at 1404. "[W]e fail to see how there can be an addition of dredged material when there is no addition of material" *Id.*

Second, the court was obviously concerned about excavation per se not being within the regulatory ambit of the CWA. Indeed, the court cited the Corps' own concerns in this regard when, in 1986, it added an exemption to the permit requirement for "de minimis, incidental soil movement occurring during normal dredging operations." 51 Fed. Reg. 41,206. 41,232 (Nov. 13, 1986). As the Corps explained then:

> Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself.
>
> Dredging operations cannot be performed without some fallback However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress.

Id. at 41,210; *NMA,* 145 F.3d at 1402 (citing this statement by the Corps). The court, in its decision, agreed with the Corps' assessment of the practical effect of including fallback within the permitting requirement for discharges of dredged materials:

> Indeed, fallback is a practically inescapable by-product of all these activities. In the preamble to the Tulloch Rule the Corps noted that "it is virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process," 58 Fed. Reg. at 45,017. As a result, the Tulloch Rule effectively requires a permit for all those activities * * *.

145 F.3d at 1403

Third, the court looked upon the two agencies' efforts in promulgating the Tulloch Rule as an impermissible attempt to cure limitations on the Corps' authority under section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, which, unlike the CWA, confers jurisdiction on the Corps to regulate excavation per se in certain waters. Generally speaking, those waters are navigable in the traditional sense and thus cover fewer waters than those falling within the scope of the CWA. In the court's view, the Corps, by regulating incidental fallback pursuant to the Tulloch Rule, was attempting to enlarge its authority to regulate excavation activities and fill in the jurisdictional gap between the Rivers and Harbors Act and the CWA "simply by declaring that incomplete removal constitutes addition." 145 F.3d at 1405. It rejected this approach, opining that the problem the two agencies were trying to correct required a legislative, not administrative, solution.

> There may be an incongruity in Congress's assignment of extraction activities to a statute (the Rivers and Harbors Act) with a narrower jurisdictional sweep than that of the statute covering discharges (the Clean Water Act). This incongruity, of course, could be cured either by narrowing the jurisdictional reach of the Clean Water Act or broadening that of the Rivers and Harbors Act.

145 F.3d at 1404.

Based on the foregoing analysis of *NMA*, it seems apparent that *NMA* is dealing with a distinctly different fact and analytical pattern than is presented in the case at hand. *NMA* is addressing a fact pattern involving incomplete removal of material from waters of the United States, whereas here, in Slinger, the entirety of the material that is removed is redeposited. In *NMA* there is a net reduction in the amount of material previously located in the excavation site, whereas here there is no reduction. As stated by the court, "[b]ecause incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge." *NMA*, 145 F.3d at 1404. It further remarked:

> Although the Act includes "dredged spoil" in its list of pollutants, 33 U.S.C. § 1362(6), Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away.

145 F.3d at 1404. The situation in *NMA*, in short, involves an excavation without any significant "addition," i.e., redeposit, of dredged spoil to the excavation site. This is significantly different from the Slinger situation. Here we have an excavation, as in *NMA*, but the entirety of the excavated material is redeposited in the trench after the drainage file is placed at the bottom of the trench. There are three readily discernible steps in the activities at issue in *Slinger*: excavation to make room for the drainage tile; placement of the drainage tile in the excavation site; and burial of the tile with the excavated material. While it is true that in *Slinger* the excavated material "falls back" into the trench (either by force of gravity or by mechanical operation of the Hoes Trenching Machine), the similarity between that process and the incidental fallback subject to the Tulloch Rule is largely superficial, for they in fact bear little factual or legal resemblance to each other — the "addition" that is missing in *NMA* is present in *Slinger*. Moreover, the addition in *Slinger* is by no means incidental, since the quantity of material redeposited amounts to 100% of the material excavated and is essential to the successful completion of the project. As explained by Slinger, if the excavation site were not refilled with the excavated soil, (i) the drainage tile, being made of plastic, would likely "float up and not remain down at the bottom of the ditch" without the weight of the soil resting on top of it, Oral Arg. Tr. at 11, and (ii) the terrain would be difficult, if not impossible, to till, plant seed, and harvest due to the presence of open trenches in the field, *see id.* at 12-13. Thus, as conceded by Slinger, it was important to restore the surface to its earlier configuration in order to facilitate the farming operation in the field. In *NMA*, by contrast, the fallback is an unavoidable by product of excavation.

Appendix B

The analysis is not altered simply because the three steps in laying the drainage tile with a Hoes Trenching Machine occur nearly simultaneously. The essential process and result would be no different were Respondent to for example, simply excavate the material by conventional means, haul it offsite temporarily while the tile is being laid and then return the material to the site to refill the trench. The tile in either instance arrives at its ultimate destination (the bottom of the trench) through a process of excavation and redeposit of large quantities of material.

Accordingly, for the foregoing reasons, we conclude that *NMA* is distinguishable from the situation presented by Respondent's operations and therefore not controlling. This is not a case where material is excavated and minuscule amounts inadvertently fall back, as was the situation addressed in *NMA*. This is a case where all of the excavated material — more than 2,900 cubic yards according the Presiding Officer's calculations — was purposefully returned to the site from which it was withdrawn. As noted previously, the *NMA* court commented that it would be inclined to defer to EPA and the Corps if they made a reasoned attempt to draw a bright line in a rulemaking proceeding between nonregulable incidental fallback and regulable redeposits. There is no reason to believe that, based on the reasoning and concerns expressed by the court, the redeposits in Slinger do not clearly fall on the regulable side of the line.[24] Thus,

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24. When the two agencies revised the definition of discharge of dredged material in response to *NMA*, *see supra* note 10, they expressly stated, in reference to the court's "bright line" remarks, that the revision was not an "attempt[ ] to draw such a line here." (Cont'd)

finding a basis for regulation in this case is entirely consistent with the court's reasoning in *NMA*.

B.

We turn next to a passage Slinger cites from Part IV of *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Part IV is one of several components of an intricately woven plurality decision that addresses whether the practice of "sidecasting"[25] during the excavation of a wetlands drainage ditch constitutes an "addition" to waters of the United States. The quoted passage reads as follows:

> While the native soil is removed from the ditch and redeposited on the immediately adjacent land, the rational interpretation of the statute leads us to conclude that the movement of native soil a few feet within a wetland does not constitute the discharge of that soil into that wetland. The statute requires, in defining discharge of a pollutant, that

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(Cont'd)
64 Fed. Reg. 25,120, 25,121 (May 10, 1999). They consequently deferred that task for a later time. "In the interim, we will determine on a case-by-case basis whether a particular redeposit of dredged material in waters of the United States requires a section 404 permit." *Id.* As noted in *SEC v. Chenery*, 332 U.S. 194, 203 (1947), "the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."

25. Sidecasting is simply the practice of depositing excavated material alongside the trench, rather than removing it to a more distant location or allowing it to fall back into the trench.

> the defendants have *added* dredged spoil to the wetland, the statutorily regulated water. While sidecasting moves excavated dirt from one particular locus in the wetland to another, it does not involve the addition of any material to the wetland. "Addition" requires the introduction of a new material into the area, or an increase in the amount of a type of material which is already present.

133 F.3d at 259.[26] Part IV acknowledges that the excavated material is a pollutant within the meaning of the CWA but

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26. The remainder of the paragraph from which the quoted passage is excerpted continues in the same vein but notes the existence of a contrary analysis in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983):

> While soil may be definitionally transformed, through the act of excavation, from a part of the wetland into "dredged spoil," a statutory pollutant, it is not *added* to the site. Were we to adopt so expansive a definition of "discharge" that any movement of soil within a wetland constitutes "addition," we would not only flaunt the given definition of "discharge," but we would be criminalizing every artificial disturbance of the bottom of any polluted harbor because the disturbance moved polluted material about. If Congress intended to reach such conduct, it need simply to redefine the term "discharge." But as the statute is currently drafted, sidecasting does not involve the *addition* of pollutants to a water of the United States. *But see Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923

(Cont'd)

concludes that merely moving the excavated material a few feet from where it was originally located does not constitute an "addition" of pollutants to waters of the United States.

Although sidecasting is different in some respects from the trenching-and-redeposit process employed by Slinger, the analytical framework of Part IV (requiring the introduction of new material or additional amounts of the existing material), if adopted and followed in this case, would obviously mean that Slinger's operations would not require a permit. EPA Region V opposes applying the Part IV analysis to the instant proceeding, basing its opposition on the grounds that the quoted passage from *Wilson* was not endorsed by the other two judges who made up the three-judge panel that decided the case and thus represents the opinion of a single judge.

EPA Region V is correct that Part IV was not endorsed by either of the two other judges, and as a consequence Part IV is not controlling precedent even in the Fourth Circuit. One of the judges simply did not join in Part IV, and the other wrote separately on the sidecasting issue, expressing strong disagreement with the interpretation in Part IV. In his separate opinion, the latter judge, Judge Payne, examined in detail the text of the controlling regulations (defining

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(Cont'd)

> (5th Cir. 1983) (holding that "addition," as included in the definition of "discharge," could include "redeposit" of dredged material which need not come from an outside source).

Wilson, 133 F.3d at 259-60.

dredged material and discharge of dredged material) and their regulatory history. He concluded that the regulations, from the outset of the implementation of section 404, "prohibited the addition into waters of the United States any material that was excavated or dredged from the waters of the United States without a permit to do so." 133 F.3d at 271 His conclusion included the following textual analysis of the regulations.[27]

> The regulations define "dredged material" to mean "material that is excavated or dredged *from* waters of the United States." 33 C.F.R. § 323.2(c). The "discharge of dredged material" was defined to mean "any addition of dredged material *into* the waters of the United States." (emphasis added). 33 C.F.R. § 323.2(d). Reading these two sections of the regulation together, it is rather clear that, without a permit to do so, one may not add *into* waters of the United States material that is excavated or dredged *from* waters of the United States. Hence, if the wetlands here at issue is a "water of the United States" * * *, then §§ 323.2(c) and (d) clearly prohibit what the parties in this appeal agree to be sidecasting in these wetlands here at issue without a permit.

133 F.3d at 269. We are in complete agreement with this analysis. A textual approach to interpretation seems

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27. The regulations referred to in the opinion are those of the Corps, which are published in volume 33 of the Code of Federal Regulations but are virtually identical to those of EPA, which are published in volume 40 of the Code of Federal Regulations.

particularly felicitous in the present circumstances, since it promotes protection of wetlands consistent with congressional concerns over their loss, yet at the same time is in full accord with the limitations on the agencies' authority over activities that involve dredging but not discharges.

Judge Payne also examined the case law, including cases[28] relied upon by EPA and the Corps in *NMA* but which the court in *NMA* ultimately found to be distinguishable for purposes of its Tulloch Rule analysis, as discussed earlier. The holding in each of the cases supports the proposition that a redeposit of dredged material constitutes an addition of a pollutant — and hence, a discharge of a pollutant — into waters of the United States. Judge Payne cited those cases for that proposition,[29] and we think they also provide supporting authority for EPA Region V's position in the present case, notwithstanding the fact that the *NMA* court did not find them helpful to EPA's and the Corps' position in the context of the Tulloch Rule. The distinction between

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28. *See, e.g., Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990); *United States v. M.C.C. of Florida*, 722 F.2d 1501 (11th Cir. 1985); *Avoyelles Sportmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

29. Judge Payne relied on the decisions in part because each, in addition to being based upon a textual analysis of the regulations, also looked to the adverse effects of the redeposits on the subject waters as a basis for concluding that a section 404 permit was required. We do not think it is necessary to go beyond a textual analysis of the regulations in order to conclude that a permit is required for the types of activities involved in those cases or in instant case. As noted earlier, the role of adverse environmental effects on wetlands is not pivotal for purposes of deciding whether or not a permit is needed.

the two situations is clear Slinger's activities do not involve incidental fallback of negligible quantities of soil associated with excavation activity as under the Tulloch Rule, but instead involve the purposeful redeposit of 100% of the material excavated from the excavation site.

C.

The Presiding Officer in the case below cited Avoyelles and Rybachek, as well as a third case, *United States v Sinclair Oil Co.*, 767 F. Supp. 200 (D. Mont. 1990), in support of his conclusion that Slinger's removal and redeposit of the excavated material constitutes a discharge under the CWA. Initial Decision at 6. As grounds for overturning the Presiding Officer's liability determination, Slinger argues that the cases are distinguishable, asserting that none is on point with the fact pattern in the present case and each involved extremely large-scale land clearing "where bottom soil from a wetland or stream was scraped and removed large distances for the specific purpose of filling other wetlands or altering the bottom of a stream. None of these cases, held that soil from within the wetland redeposited directly back into the same place in the wetland would constitute an 'addition'." Slinger App. Br. at 7.

Slinger is correct in noting these distinctions, but the distinctions by themselves prove little. The important point to be gleaned from each of the cases is that material taken from a particular body of water (wetland or stream) and redeposited into that same body of water, albeit not at the same exact location, is deemed a pollutant and its reintroduction into the body of water is deemed an addition

of a pollutant to that body of water, thus constituting a discharge of a pollutant into waters of the United States. The fact that in those cases the removal site and the redeposit site are not identical does not prove that the cases are inapplicable; it simply points out that the case before us is one of first impression, which we are now called upon to decide. From the textual analysis of the regulations discussed above, we see that removal of material *from* waters of the United States is a legally discrete event that is separate from the addition of that same material *into* waters of the United States.

The Presiding Officer's finding of liability against Slinger is fully supported by a textual analysis of the regulations. Dredged material, by its very nature, is something that has been removed "from" a body of water by dredging or excavation, it does not exist as such until it is removed from a body of water. Once it comes into existence, it becomes a pollutant as defined in section 502(6) of the Act. If it is subsequently redeposited "into" the same body of water, but at another location, the case law uniformly treats the redeposition as an addition of a pollutant to waters of the United States. The result should be no different when, as here, the dredged material is not just redeposited into the same body of water, but is also redeposited into the same location from which it was originally removed. There is nothing in the Act or regulations to suggest that dredged material in those circumstances, having once attained pollutant status, somehow loses that status upon redeposition into its former location. Redeposition of dredged material into a body of water constitutes the discharge of dredged material and, hence, an addition of a pollutant to waters of the United States for which a permit is required under section 404 of the Act.

Appendix B

Because Slinger did not have a permit at the time of the discharge,[30] we sustain the Presiding Officer's finding of liability. A Hoes Trenching Machine uses a chainsaw-type arm to remove the soil *from* the bottom of the wetland and then redeposits the soil back *into* the wetland, thus fulfilling the definitional requirements of the regulations. Accordingly, for the foregoing reasons, we also reject Slinger's contention that *Wilson* lends support to its position.

We turn now to consideration of the penalty assessed by the Presiding Officer against Slinger.

IV.

EPA Region V sought a civil penalty of $90,000 in the complaint it filed against Slinger. As related by the Presiding Officer in the initial decision, Slinger maintained that the penalty proposed in the complaint was unconscionable and inappropriate based on the facts of the case "but [it] offer[ed] no argument in support of its contentions." Initial Decision at 10. The Presiding Officer nevertheless proceeded to discuss a series of matters — the nature and circumstances of the violation, the extent of the violation, the gravity of the violation, Slinger's ability to pay the penalty, its history of prior violations, culpability, economic benefit, and other factors as justice may require — all of which are factors that must be separately considered before assessing a penalty under the CWA and the applicable regulations.[31] Upon

30. Nor has Slinger shown entitlement on this record to an exemption under section 404(f) of the Act.

31. As summarized by the Presiding Officer:

(Cont'd)

consideration, he assessed a $90,000 civil penalty against Slinger, as requested in the complaint.

We see no obvious errors in the Presiding Officer's penalty assessment, and, therefore, we see no reason to change his penalty assessment.[32] On appeal Slinger has

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(Cont'd)

> Administrative penalties for violations of CWA § 301(a) are determined in accordance with CWA § 309(g). Section 309(g)(2)(B) provides for class II civil penalties of up to $10,000 per day for each day a violation continues and a maximum penalty of $125,000. Section 309(g)(3) directs that "the nature circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require" are to be considered in determining the amount of any penalty to be assessed. In addition, Consolidated Rule of Practice 22.27(b) provides that "if the Presiding Officer decides to assess a penalty different in amount from the penalty proposed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

Initial Decision at 10.

32. As we have repeatedly emphasized, in cases where, as here, "the Presiding Officer assesses a penalty that falls within the range of penalties provided in the penalty guidelines, the Board generally will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse

(Cont'd)

maintained its stolid silence, asserting only that the penalty is "unconscionable," Slinger App. Br at 10, and has elected to ignore the Presiding Officer's cue to supply further explanation to support its contention. The penalty is affirmed.

CONCLUSION

For the reasons expressed above, an administrative penalty of $90,000 is assessed against Slinger. Payment of the penalty shall be made within sixty (60) days of receipt of this final order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to.

EPA Region V
Regional Hearing Clerk
Post Office Box 70753
Chicago, IL 60673

So ordered.

(Cont'd)
of discretion or a clear error in assessing the penalty." *In re SchoolCraft Constr., Inc.*, CAA Appeal No. 98-3, slip op. at 22 (EAB, July 7, 1999), 8 E.A.D. __ (citing *In re Pacific Ref. Co.*, 5 E.A.D. 607, 612 (EAB 1994); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994)).

APPENDIX C — INITIAL DECISION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY DATED SEPTEMBER 14, 1998 AND FILED SEPTEMBER 17, 1998

UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

DOCKET NO. 5-CWA-97-022

IN THE MATTER OF
SLINGER DRAINAGE, INC.

RESPONDENT

INITIAL DECISION

The complaint in this case was issued to Slinger Drainage, Inc. (Respondent) on September 22, 1997. The action was initiated pursuant to section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g). The complaint alleges that Respondent violated CWA section 301(a), 33 U.S.C. § 1311(a) when it discharged pollutants into the waters of the United States without a permit. The Complainant requests assessment of a $90,000 penalty. Respondent answered the complaint on October 10, 1997. An oral evidentiary hearing was held in Madison, Wisconsin on May 14, 1998.[1]

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1. Complainant is represented by Robert S. Guenther, Esq. and Eva Hahn, Esq. and Respondent is represented by Gary R. Leistico.

Appendix C

FINDINGS OF FACT

The Respondent is the owner and operator of a field drainage contracting company with its place of business at N7265 Jones Road, Randolph, Wisconsin. Respondent has been a registered corporation in good standing in Wisconsin since July 7, 1971 and is a person under CWA section 502(5), 33 U.S.C. § 1362(5). The Agency provided notice of the commencement, and opportunity for consultation, about this action to Wisconsin. In July 1994, Respondent performed drainage construction on property owned by Dennis Shoup, consisting of more than 100 acres in the east one-half of Section 34, Township 12 North, Range 13 East, Westford Township, Dodge County, Wisconsin. It was Shoup's intention in hiring Respondent to drain water from the site and farm on it. The site is a wetland depression in a drumlin field, a geologically distinctive area which alternates ridges and depressions.

Respondent laid about 26,000 feet of drainage tile to form a drainage grid over approximately 50 acres of the northern portion of the site in July 1994. In order to place the drainage tiles in the wetland Respondent dug a thirteen inch wide, 4-6 feet deep, trench. The Respondent used a Hoes trenching machine and hand shovels to remove spoil and deposit it on the surface of the wetlands outside the trench. The trench was dug by a trenching arm on the Hoes trenching machine, as it ran across the surface of the Shoup wetland. The trenching arm cast the dredged material to each side of the trench. As the Hoes machine dredged and deposited the soil on the sides of the trench, plastic drain tile was fed from a spool down into the trench. Next, concave shaped disks, at

the back of the Hoes trench machine, knocked the soil back into the trench, covering the drain tile. Altogether, Respondent removed and deposited elsewhere on the site more than 2900 cubic yards of fill material, creating an excavated soil imprint of one-half acre. The remaining soil and organic materials were returned to the trench by a tractor with an attached blade. A portion of the removed soil and organic materials remained on the surface of the excavated area. The Respondent did not obtain, or have, pursuant to CWA section 404, 33 U.S.C. § 1344, a permit to fill wetlands from the Agency or the Army Corps of Engineers.

The Shoup wetland site is adjacent to a waterway known as the Town Ditch. The Town Ditch flows into the Beaver Dam River which flows into the Rock River and then into the Mississippi River. The site has historically been a wetland, as defined by 40 C.F.R. § 230.3(t). The soil displaced at the site by the Hoes trenching machine was composed primarily of organic soils. Organic soils are indicative of soil conditions that are regularly saturated by water. Standing water and water saturation of the soil on the site has been observed. The site also contains plant species which grow in saturated soil conditions.[2] The site lies in a flyway for ducks migrating from Canada to the southern United States.

The Respondent, which has been in the business of providing field drainage services for at least 25 years, does

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2. Wetlands, such as the Shoup wetland, are a habitat for important animal and plant species, provide water retention for flood control and filtration of surface waters and ground waters, including drinking water aquifers. 33 C.F.R. § 320.4(b).

not inquire whether a CWA section 404 permit has been obtained unless a property owner is receiving a federal or state farm subsidy. Charles Slinger, the sole owner of the Respondent, believes that the Clean Water Act is "generally ignored" and is treated as a "don't ask, don't tell" law. When he knows that a client is receiving farm subsidies, Slinger asks the client if it has a permit to drain wetland because draining the wetland without a permit would result in the landowner losing its subsidy.

The area around, and including, the site has two special designations. The Wisconsin Department of Natural Resources in 1990 designated the Beaver Dam River watershed as a priority watershed for funding for non-point source pollution control. Referred to as the Beaver Dam River Priority Watershed Project, sites within the watershed are eligible for technical assistance to correct problems associated with delivery of excess sediments and nutrients to the waters comprising the watershed. Testimony of State of Wisconsin and Agency officials indicated that conversion of the site to agricultural use is likely to increase the flow of sediments to Beaver Dam Lake. Increased sediments in the lake can affect the turbidity of the water, which affects the depth at which plant communities can thrive. Plant communities in turn affect fish and waterfowl breeding. Upstream wetlands act as a filter to absorb and remove excess nutrients from the flow of water through a watershed. Excess nutrients are a chronic problem in Beaver Dam Lake and lower the water quality in the lake. The wetlands, which are the subject of this proceeding, support a large number of plants and wildlife that rely on wetlands for their habitat. In order to maintain the wetlands habitat, the Glacial Habitat

Restoration Area (GHRA) was established. The GHRA area receives money from the state and federal governments in order to reverse the historic decline of wildlife habitat which has resulted from wetland drainage and the conversion of upland grasslands to agriculture.[3]

Before Respondent began excavating at the site, it received, on April 24, 1990, a letter from the District Engineer for the United States Army Corps of Engineers, St. Paul District. The letter was in reference to the drainage system that Respondent installed on the John Crescio farm. Respondent was informed that the discharge of dredged materials into wetlands adjacent to a tributary of Fox Lake without a Department of the Army permit violates CWA section 301.

Slinger represented that he and his employees have had no training in identifying wetlands. Although, when Slinger was questioned at the hearing about how to identify a wetland, he was able to identify the type of soil, water, plant and wildlife conditions that make up wetland areas. Slinger and his employees, he represented, had not received any formal training in application procedures for CWA section 404 permits.

Respondent has not had a previously adjudicated violation against it. The Complainant reviewed the

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3. The testimony indicates that the destruction of the wetland in this case resulted in the destruction of wildlife habitat, increased risk to downstream landowners of increased flood heights or peak flood heights, destroyed the ability of the wetland to properly filtrate pollution and increased erosion.

Dun & Bradstreet Corporation report on the Respondent. On December 30, 1996, when the Respondent was asked in a pre-complaint information request by the Agency's Director of the Water Division, Region 5, to provide information on the number of tiling projects in which it was involved, it refused to respond. When questioned at the hearing about the size of its tiling business, Slinger's answers were evasive and incomplete. Respondent, apparently, performed between 10 and 30 drain tile installation projects in each year in the last three or four years.

CONCLUSIONS

CWA section 309(g)(1)(A) provides for a class II civil penalty for any person who violates CWA section 301(a). Section 301(a) makes it unlawful for any person to discharge any pollutant into navigable waters, except in compliance with section 404 of the CWA. Section 404 of the CWA permits the Secretary of the Army acting through the Chief of Engineers, U.S. Army Corps of Engineers to issue permits for the discharge of dredged or fill material into navigable waters. Discharge of pollutants is defined in section 502 (12), 33 U.S.C. § 1362(12), as "any addition of any pollutant to navigable waters from any point source. . . ." A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch channel, tunnel, conduit [or] discrete fissure . . . from which pollutants are or may be discharged." CWA § 502(14). Pollutant is "dredged spoil, solid waste, . . . biological materials, . . . rock, sand [or] agricultural waste discharged into water." CWA § 502(6). Navigable waters of the United States include wetlands, which are those areas that are "inundated or

saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 230.3(t).

The Respondent's actions come within the definitions and prohibitions of the foregoing statutory sections. Respondent operates a field drainage contracting company in Randolph, Wisconsin; it is a corporation registered under the laws of Wisconsin. In July 1994, Respondent installed drainage tile on approximately 50 acres of the 100 acres of wetland owned by Dennis Shoup in Dodge County, Wisconsin. Respondent operated a Hoes trenching machine, shovels and a tractor with a scraper blade to remove soils and organic materials from the site and deposit them in a location other than the location from which they were removed. The amount of soil and organic material removed was more than 2900 cubic yards, which formed a footprint of about one-half acre. The site on which the soil was removed and deposited by the Respondent is a "wetland" and is among the waters of the United States and a navigable waterway, pursuant to the statutory definitions. Hydrologically, the site drains into the Town Ditch which drains into the Beaver Dam River.

The soil and organic material, removed and deposited by Respondent at the site, are prohibited "pollutants" under CWA § 301. And Respondent's removal and redeposit of vegetation or other materials in the wetland is a discharge under the CWA. *Rybachek v. EPA*, 904 F2d 1276, 1285-86 (9th Cir. 1990); *Avoyelles Sportsmen's League v. Marsh*,

715 F2d 897, 923, 924 n. 43 (5th Cir. 1983); *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 204 (D. Mont. 1990). The Hoes trenching machine, shovels and tractor driven scraper used by Respondent are point sources or conveyances from which pollutants were discharged. *U.S. v. Tull*, 615 F. Supp. 610, 622 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985) *rev'd* on other grounds, 481 U.S. 412 (1987).

Respondent concedes that it did not possess a CWA § 404 permit which would have permitted removal and redeposit of soils and organic material in the Shoup wetland. Each discharge by Respondent of pollutants into navigable waters without the required permit issued pursuant to CWA § 404 constitutes a day of violation of section 301(a). Moreover, each day the material discharged by Respondent remains in the wetland without the required permit issued pursuant to CWA § 404 constitutes a day of violation of section 301. The fill material that Respondent discharged in July 1994, remains in place, although the drainage system constructed by the Respondent was disabled on October 1, 1995.

Respondent argues that the insertion of drainage tiles in a wetland is not a discharge and is, therefore, not prohibited by the CWA. It concedes that its purpose was to alter the wetland by draining it of water in order that Shoup might plant crops in the wetland. In addition, Respondent does not contest that in laying 26,000 feet of drainage tile it removed 2900 cubic yards of soil and organic material from trenches that were from 4 to 6 feet deep. Nor does it dispute that it operated a Hoes trenching machine, shovels and a tractor with a scraper blade to remove soils and organic materials

from the site and deposit them in a location other than the location from which they were removed. However, it contends that its main purpose was not to move 2900 cubic yards of soil but to install the 26,000 feet of drainage tile. Respondent argues that the movement of the soil and organic material was not a discharge but only incidental to the laying of the tile. Respondent maintains that incidental discharges are not prohibited by the CWA because they do not amount to polluting discharge.

Respondent's argument is contrary to existing law. The redeposit of materials excavated from a wetland is the addition of pollutants under the CWA. *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985). The regulations of the Army Corps of Engineers explain that an addition of spoil from a wetland which results from dredging or the making of trenches, such as those dug by Respondent, is subject to the CWA permit requirements. The regulations define "dredged material" to mean "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c). When the Corps of Engineers promulgated regulations defining dredging and the sidecasting of the dredged material, it stated that it sought to regulate the discharge of dredged material not the dredging. 51 Fed. Reg. 41206 (1986). But most significant in terms of Respondent's argument, the Corps explained that disposal of the dredged material involved is not incidental "[i]f this material [the material being dredged] is disposed of in a water of the United States, by sidecasting or by other means[.] [T]his disposal will be considered to be a 'discharge of dredged material' and will be subject to regulation under section 404." *Id.* at 41210. While the regulations have been amended, the

Corps of Engineers has consistently interpreted the CWA to require a permit for the type of activity found in this case.

The Army Corps of Engineers interpretation is consistent with CWA section 404. Except for "non-prohibited" discharges of dredge or fill material — all of which are enumerated — section 404(f)(2) states that "[a]ny discharge of dredged or fill material in the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit. . . ."

Respondent dug 26,000 feet of trenches and removed and redistributed 2900 cubic yards of various layers of the wetland. Gregory Carlson, Environmental Protection Specialist at the Agency, found that the 2900 cubic yards of dredged material was sidecasted over an actual footprint of approximately one-half acre. The effect was to pollute and disrupt more than fifty of the one hundred acres of the Shoup wetland. The CWA defines dredge spoil and excavated soils as pollutants.[4]

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4. The reason behind the statutory requirements is illustrated by the record. The wetland drained by the Respondent was located in a depression area in the glaciated landscape where the uplands, or drumlins, are farmed. The sponge of the wetland filters out pollutants, such as sediments and any associated contaminants that flow off the upland farming areas. According to Carlson, it is probable that the layers of the filter removed by the Respondent contain the contaminants of farming which have now been brought to the surface and introduced into the surface water.

Finally, Respondent argues that its excavation of the Shoup wetland is permitted by the injunction upheld in *National Mining Assoc. v. U.S. Corps of Engineers*, No. 97-5099, 1998 U.S. App LEXIS 13009 (D.C. App. 1998). There, the court upheld a District Court injunction of the Corps' rule which prohibited, without a permit, apparently any sidecasting in a waterway when dredged material was being removed from the site. That rule was not at issue in this proceeding. Moreover, there is no evidence that Respondent removed the dredged material from the site and intended to leave only that that fell back into the waterway. All of the spoil which Respondent dredged or excavated was redeposited in the waterway. It was intended to, and did, change the use of the land from wetland to farmland.

PENALTY

Administrative penalties for violations of CWA § 301(a) are determined in accordance with CWA § 309(g). Section 309(g)(2)(B) provides for class II civil penalties of up to $10,000 per day for each day a violation continues and a maximum penalty of $125,000. Section 309(g)(3) directs that "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require" are to be considered in determining the amount of any penalty to be assessed. In addition, Consolidated Rule of Practice 22.27(b) provides that "if the Presiding Officer decides to assess a penalty different in amount from the penalty proposed in the complaint, the Presiding Officer shall

set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(3).[5]

Complainant asserts that the facts of this case, when considered in light of the statutory penalty factors and the need for deterrence, warrant the imposition of a penalty of $90,000. Respondent maintains that the proposed penalty is unconscionable and inappropriate based on the facts of the case, but offers no argument in support of its contentions.

Nature and Circumstances of the Violation

Complainant's penalty witness Greg Carlson explained the nature and circumstances of Respondent's violation. Carlson testified, and Respondent did not dispute, that consequent to its installation of approximately 26,000 feet of drainage tile at the Shoup site, Respondent discharged 2900 cubic yards of dredged spoil into a wetland, which is a "water of the United States" as that term is defined in EPA and Corps of Engineers regulations. The dredged spoil was discharged without a permit issued by the Corps of Engineers pursuant to section 404 of the CWA and therefore constituted a discharge of pollutants into the waters of the United States in violation of CWA § 301(a).

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5. Consolidated Rule 22.27(b) also directs that the presiding officer consider, in addition to the factors enumerated in the statute, any civil penalty guidelines issued under the statute. The Agency has not issued any civil penalty guidelines for assessment of penalties for violations of CWA § 404. Accordingly, the statutory penalty factors alone will guide assessment of the penalty in this case.

Appendix C

Extent of the Violation

The record establishes that the extent of Respondent's violation was significant. Respondent's discharge of at least 2900 cubic yards of dredged spoil in July of 1994 left a footprint of 1/2 acre over a 50 to 65 acre area of the Shoup wetland. The tile system installed by Respondent operated from approximately August 1, 1994, to October 1, 1995, which is approximately 15 months or 450 days, during which time the discharged material remained undisturbed. The period of violation therefore encompasses the full 15 months or 450 days. *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987) (period of violation includes not only the days on which the work was done, but each day discharged material remained in place). As Complainant points out, assessing the per day maximum penalty of $10,000 would yield a penalty far in excess of the statutory cap of $125,000.

Gravity of the Violation

Testimony presented at the hearing establishes the gravity of Respondent's violation as very serious. As Carlson testified, wetlands like the Shoup wetland perform three critical environmental functions, they provide a unique and fertile habitat for wildlife; they provide a "sponge" to moderate the flow of surface water through the watershed, thereby lessening the risk and extent of flooding; and they act as a "filter" by slowing the passage of water and allowing some of the contaminants to drop out and be contained in the wetland substrata. Respondent's actions compromised

the Shoup wetland's ability to perform all three of these critical environmental functions.

In addition, the wetland at issue is located within two areas specially designated by the State of Wisconsin, the GHRA and the Beaver Dam River Priority Watershed Project. The GHRA seeks to recover and restore wetland and grassland habitat for wildlife populations that have declined as wetland areas have disappeared. The Beaver Dam River project seeks to identify and limit sources of nutrient and sediment pollution within the river's watershed, of which the Shoup site is a part. Carlson testified that unauthorized conversion of the Shoup wetland would exacerbate the problems that these programs seek to remedy.

Finally, the testimony of Lynn Hanson and Mark Sesing of the Wisconsin Department of Natural Resources detailed the impact of unauthorized conversion of the Shoup site on wildlife and Beaver Dam Lake. Hanson testified that the glacial habitat represents the traditional core habitat of duck and pheasant populations in the area. He stated that approximately 50% of the wetlands in the area have been lost, primarily to agriculture. Sesing testified that wetlands play a critical role in maintaining water quality in the lake and that conversion of the Shoup site would result in increased turbidity in Beaver Dam Lake. Increased turbidity in the lake affects the depth at which aquatic plants can grow and leads to algal blooms, both of which have a negative impact on the lake as a habitat for fish and wildfowl.

Appendix C

Respondent's Ability to Pay

Carlson testified that based on his review of joint exhibit 1, a financial information report from Dun and Bradstreet Corporation, Respondent is financially healthy and able to pay the proposed fine. The report indicated that in 1996 Respondent had annual sales of approximately $1 million and paid its bills in a timely fashion. While Respondent stated that it does not provide information to Dun and Bradstreet, Respondent did not offer any testimony contradicting Complainant's assertion of its ability to pay.

History of Prior Violations

Mr. Carlson testified that his review of Agency files revealed that Respondent had no prior adjudicated violations of the CWA.

Culpability

The hearing record reflects a high degree of culpability on the part of Respondent. Respondent has been in the drainage business for more than thirty years; activities affecting wetlands have been regulated since 1975. As Slinger admitted, customers engage his company when they have wet property that they want drained. Although his answers were vague and evasive, Slinger testified that Respondent performed somewhere between ten and thirty tile installations in each of the last several years. As an experienced, long time operator in a highly regulated activity, Respondent should have been aware of the need to seek a permit for the work done on the Shoup property.

Compounding Respondent's culpability, the record establishes that Respondent was aware of the wetland regulatory scheme and its possible application to his drainage construction activities but chose to ignore it. A letter from the Corps of Engineers to Respondent in April of 1990 (JX-4) concerning another tiling project put Respondent on notice that his drainage construction activities constituted discharges of dredged materials into wetlands and required a permit from the Corps, and could violate section 301 of the CWA. In spite of such notice Respondent proceeded to install the drainage tile on the Shoup site without seeking a permit from the Corps of Engineers. Slinger testified that it was his practice to inquire about permits only when the farmer he was installing tiling for was receiving a state or federal farm subsidy because "they cannot receive farm subsidies if they are draining a wetland . . . ." Tr.-213. Finally, Slinger's letter to Congressman Scott Klug (JX-5), in which he describes the CWA's wetlands program as "generally ignored" and treated as "a don't ask, don't tell" arrangement, reinforces the conclusion that Respondent knew it was illegally discharging pollutants into the Shoup wetland.

Economic Benefit

According to Complainant, the economic benefit accruing to Respondent in this negligible.

Other Factors as Justice May Require

In asserting that the proposed penalty is inappropriate and unconscionable based on the facts of the case, Respondent appears to be arguing that if any penalty is to be

assessed, justice requires that it be lower than the proposed amount. Respondent, however, presents no argument in favor of such a reduction.

To the contrary, the record indicates that Respondent's actions have either been taken into account in fashioning the proposed penalty or militate against any reduction in the proposed penalty for "other factors as justice may require." On one hand, Carlson testified that Respondent's restoration of the site, a factor that can result in a lower gravity assessment, was taken into consideration in assessing the gravity of Respondent's violation. On the other hand, Carlson testified that Respondent was uncooperative and evasive in response to Complainant's CWA § 308(a) information request in January of 1996. Specifically, Respondent refused to provide a list of other tiling projects it had undertaken in the ten years prior to the request. Carlson further testified that a renewal of the request again met with no response. Slinger's hearing testimony on this question, as already detailed, was equivocal.

Based on the foregoing it is determined that Complainant has demonstrated, pursuant to CWA § 309(g)(3), that the proposed penalty of $90,000 is appropriate and supported by the record.

ACCORDINGLY, IT IS ORDERED that Respondent IS ASSESSED a penalty of $90,000 for violating CWA § 301(a) by discharging pollutants into the waters of the United States without a permit.

Appendix C

Payment of the full amount of the civil penalty assessed must be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

U.S. EPA, Region V
(Regional Hearing Clerk)
The First National Bank of Chicago
P.O. Box 70753
Chicago, Illinois 60673

A transmittal letter identifying the subject case and the EPA Docket number, plus Respondent's name and address must accompany the check.

Failure by Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

Pursuant to 40 C.F.R. § 22.27(c), this initial decision will become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceeding unless (1) an Appeal to the Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision. If an Appeal is taken, it must comply with § 22.30. A notice of Appeal and an accompanying brief must be filed with the Environmental Appeals Board and all other parties within twenty (20) days after this decision is served upon the parties.

Appendix C

s/ Edward J. Kuhlmann
Edward J. Kuhlmann
Administrative Law Judge

September 14, 1998
Washington, D. C.

APPENDIX D — PER CURIAM ORDER AND MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 13, 2001

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 13, 2001

No. 99-1433

SLINGER DRAINAGE, INC.,

PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT

On Petitioner's Petition for Rehearing

Before: EDWARDS, *Chief Judge*, SENTELLE and RANDOLPH, *Circuit Judges*.

ORDER

Upon consideration of petitioner's petition for rehearing, it is

ORDERED that the petition be denied for the reasons stated in the attached memorandum.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

Appendix D

MEMORANDUM

Slinger Drainage, Inc.'s petition for rehearing is meritless. Petitioner claims that our published decision in this case, *Slinger Drainage, Inc. v. EPA*, 237 F.3d 681 (D.C. Cir. 2001), is inconsistent with the court's decision in *United States v. Carver*, 671 F.2d 577 (D.C. Cir. 1982). This claim is misguided. *Carver* involved our consideration of FED. R. CRIM. P. 6(g), which states that "no grand jury may serve more than 18 months." We held that this provision should be interpreted in light of FED. R. CRIM. P. 45(a), which requires that "[i]n computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included." *Carver* did not address the situation presented here — a statutory judicial review provision in which Congress has mandated a particular method of counting.

Petitioner also points to this court's disposition in *National Federation of Federal Employees, Local 1300 v. Federal Labor Relations Authority*, No. 85-1541 (D.C. Cir. Nov. 6, 1985) ("*NFFE*"), as grounds for rehearing. The court's unpublished order in *NFFE* merely states that "Appellant filed a timely petition for review. *See* FED. R. APP. P. 26 (a)." Obviously, this provides no basis for rehearing. More importantly, however, under D.C. CIR. R. 28(c), "[u]npublished orders or judgments of this court . . . are not to be cited as precedent." Accordingly, the judgment in *NFFE* is not binding precedent.

APPENDIX E — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING *EN BANC* AND STATEMENT OF CIRCUIT JUDGE WILLIAMS DISSENTING FROM THE DENIAL OF REHEARING *EN BANC* DATED AND FILED APRIL 13, 2001

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 13, 2001

No. 99-1433

SLINGER DRAINAGE, INC.,

PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT

Before: EDWARDS, *Chief Judge*; WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

A statement of *Circuit Judge* WILLIAMS dissenting from the denial of rehearing *en banc* is attached.

A separate Memorandum Opinion supporting the denial of rehearing is attached to the order denying the petition for panel rehearing.

Appendix E

WILLIAMS, *Circuit Judge*, dissenting: I am not persuaded by the court's view that Rule 26(a) of the Federal Rules of Appellate Procedure cannot be reconciled with 33 U.S.C. § 1319(g)(8). Rule 26(a) sets up a general rule on how to *apply* a provision that sets forth a "period" (i.e., time limit): Don't count the day "that begins the period." Then the substantive statute identifies a "period," 30 days, that "begins" on the date the civil penalty order is issued. One can put the two together by saying that the substantive statute identifies the "day that begins the period" as the issuance date; Rule 26(a) tells us to exclude that day. See also *American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority*, 802 F.2d 47, 48 (2d Cir. 1986) ("The statute [5 U.S.C. § 7123(a)] declares that the 60-day *period* begins on the date the order is issued, but does not direct that the *date of issuance* be counted as part of that period.").

APPENDIX F—PERTINENT PORTIONS OF RELEVANT STATUTES AND RULES

33 U.S.C. § 1319(g)(8)

Judicial review. Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment —

> (A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or
>
> (B) in the case of assessment of a class II civil penalty, in the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless

the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

Federal Rule of Appellate Procedure 26(a)
[pertinent portion]

(a) Computation of Time. In computing any period of time prescribed or allowed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate, Saturdays, Sundays, and legal holidays shall be excluded in the computation. * * *

Appendix F

Federal Rule of Civil Procedure 6(a)

(a) Computation of Time. In c[illegible]n computing any period of time prescribed or allowed [illegible]wed by these rules, by the local rules of any district cou[illegible] court, by an order of court, or by any applicable statute[illegible]tute, the day of the act, event, or default from which [illegible]ich the designated period of time begins to run shall n[illegible]ll not be included. The last day of the period so com[illegible]computed shall be included, unless it is a Saturday, a Su[illegible]a Sunday, or a legal holiday, or, when the act to be done i[illegible]one is the filing of a paper in court, a day on which w[illegible]h weather or other conditions have made the office of [illegible] of the clerk of the court inaccessible, in which event [illegible]ent the period runs until the end of the next day which i[illegible]ich is not one of the aforementioned days. When the [illegible]he period of time prescribed or allowed is less [illegible]ss than 11 days, intermediate, Saturdays, Sundays, an[illegible]s, and legal holidays shall be excluded in the computatio[illegible]ation. * * *

Supreme Court, U.S.
FILED
SEP 14 2001
CLERK

(2)

No. 01-86

In the Supreme Court of the United States

SLINGER DRAINAGE, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Solicitor General
Counsel of Record
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1000

QUESTIONS PRESENTED

Whether petitioner timely appealed a decision of the Environmental Appeals Board of the Environmental Protection Agency within the 30-day appeal period prescribed by 33 U.S.C. 1319(g)(8)(B).

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In the Supreme Court of the United States

No. 01-86

SLINGER DRAINAGE, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 237 F.3d 681.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2001. A petition for rehearing was denied on April 13, 2001 (Pet. App. 66a-71a). The petition for a writ of certiorari was filed on July 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is in the business of installing field drainage tile. Petitioner was hired by a landowner who wanted to drain a wetland portion of his property in

southeastern Wisconsin to make it suitable for farming. In completing that project, Slinger installed 26,000 linear feet (almost five miles) of drainage tile in a 50-acre area of wetlands. Pet. App. 2a, 48a. Following an evidentiary hearing, an administrative law judge (ALJ) determined that petitioner had violated Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), by redepositing dredged material into waters of the United States without obtaining the permit required under Section 404 of the Act, 33 U.S.C. 1344. The ALJ assessed a Class II civil penalty of $90,000. Pet. App. 2a.

2. On September 29, 1999, the Environmental Appeals Board (EAB) of the Environmental Protection Agency affirmed the ALJ's decision. On November 1, 1999, petitioner appealed the EAB's decision to the United States Court of Appeals for the District of Columbia Circuit. Pet. App. 2a-3a.

3. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-5a. The court observed that the Clean Water Act provides that a party may obtain judicial review of an assessment of a Class II penalty "by filing a notice of appeal * * * * within the 30-day period beginning on the date the civil penalty order is issued." *Id.* at 2a (quoting 33 U.S.C. 1319(g)(8)(B)). The court assumed, without deciding, that the EAB issued its decision on September 30, 1999, the day the EAB mailed its decision to petitioner and posted the decision on its website. The court nonetheless held that petitioner's appeal was untimely, because the 30-day period under 33 U.S.C. 1319(g)(8)(B) ended on October 29, 1999, and the notice of appeal was not filed until November 1, 1999. The court explained that it would not apply Federal Rule of Appellate Procedure 26(a), which provides that a computation of a time period under the Rules or an "applicable statute"

should "[e]xclude the day of the act, event, or default that begins the period." The court reasoned that the Clean Water Act itself specifies that the 30-day period begins *on* the date the civil penalty order is issued and thus the date of September 30 must be included in computing the 30-day period. Pet. App. 4a-5a.

ARGUMENT

Petitioner asks this Court to hold that his appeal was timely because the 30-day appeal period under 33 U.S.C. 1319(g)(8)(B) began on the day *after* the civil penalty order was issued, and that the date of issuance was the day on which the order was mailed to the parties and posted on EPA's website rather than the day that the order was signed and dated. Petitioner's contention, however, lacks merit and, in any event, does not warrant this Court's review.

1. The court of appeals correctly held that 33 U.S.C. 1319(g)(8)(B) directs that the 30-day appeal period begins on the date of issuance of a civil penalty order. Pet. App. 4a-5a. The text of that provision provides that a person seeking review of an EPA administrative civil penalty order under the Clean Water Act must file a notice of appeal "within the 30-day period beginning *on the date* the civil penalty order is issued." 33 U.S.C. 1319(g)(8)(B) (emphasis added). "Judicial review provisions * * * are jurisdictional in nature and must be construed with strict fidelity to their terms. * * * This is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, 'mandatory and jurisdictional.'" *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (quoting *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990)). The court of appeals properly applied that principle in concluding that 33 U.S.C. 1319(g)(8)(B) dictates that the 30-day

period begins on, not after, the date of an order's issuance. Pet. App. 2a.

Petitioner errs in relying (Pet. 13) on Federal Rule of Appellate Procedure 26(a)(1), which provides for the exclusion of the date of an order to be appealed with respect to the computation of time for an appeal under any "applicable statute." The court of appeals correctly concluded that Rule 26(a) has no application to 33 U.S.C. 1319(g)(8)(B) because "Congress has specified a particular method of counting in the statute itself and there is no indication of a contrary congressional intention." Pet. App. 4a. Contrary to petitioner's assertion (Pet. 17), Rule 26(a) and the statute cannot be read together. Rule 26(a) provides for counting to begin *after* the date an order is issued, while 33 U.S.C. 1319(g)(8)(B) specifies that the counting must begin *on* the date that the order is issued.

Petitioner further argues (Pet. 14-25) that the court of appeals' decision is inconsistent with the decisions of other courts. Petitioner cites no other decision, however, interpreting 33 U.S.C. 1319(g)(8)(B), the statute at issue in this case. Indeed, many of the decisions that petitioner cites involve statutes that provide that the running of the appeal period begins "after" the action sought to be appealed,[1] or address the application of Federal Rule of Appellate Procedure 26(a)(3), which

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[1] See, *e.g.*, *Burnet* v. *Willingham Loan & Trust Co.*, 282 U.S. 437 (1931) (claim must be filed "within five years after" tax return was due or was filed); *United Mine Workers of America* v. *Dole*, 870 F.2d 662, 663 (D.C. Cir. 1989) (a challenge to a new safety standard under 30 U.S.C. 811(d) must be filed before the 60th day "after" such standard was promulgated); *Tribue* v. *United States*, 826 F.2d 633 (7th Cir. 1987) (claim under Federal Tort Claims Act must be filed within six months after final denial of claim by agency).

extends the time to file when the last day falls on a weekend or holiday.[2]

Petitioner also relies (Pet. 20-21) on *American Federation of Government Employees* v. *FLRA*, 802 F.2d 47 (2d Cir. 1986). That decision interpreted 5 U.S.C. 7123(a), which provides for review of a final agency order "during the 60-day period beginning on the date on which the order was issued." The court concluded that the clock under 5 U.S.C. 7123(a) begins after the date that the order was issued. 802 F.2d at 48-49. The court reasoned that counting the date of issuance as one of the 60 days leaves a petitioner with only 59 days plus some portion of the date of issuance, depending on the time of day on which the order is issued. *Id.* at 48. The result reached by the court, however, expands the 60-day period to 60 days plus some portion of the date of issuance, because theoretically a petitioner could file its appeal on the date of issuance.

In any event, *American Federation* does not present a square conflict with the decision below because the decisions interpret different statutes. Moreover, the existence of a single decision decided 15 years ago suggests that even if there is a tension in the circuits, it is not sufficiently developed or widespread to warrant review by this Court at this time.

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[2] We do not dispute that Rule 26(a)(3) would apply if the final day of petitioner's appeal period had fallen on a weekend or holiday, because Section 1319(g)(8)(B) itself does not address computation in the event that the 30th day falls on a weekend or holiday.

2. This Court's review is also not warranted because petitioner's appeal was untimely in any event unless petitioner is also correct in its contention that the date of issuance of the civil penalty was September 30, 1999 (the date the decision was sent to petitioner) and not September 29 (the date of the decision). Pet. App. 3a; see also Pet. 8-9, 25-27. The court of appeals, however, did not decide that question or consider the general question of when a civil penalty order is "issued" for purposes of 33 U.S.C. 1319(g)(8)(B). See Pet. App. 3a ("For the purpose of assessing our jurisdiction, we assume, without deciding, that [petitioner] is correct that the order issued on Thursday, September 30, 1999."). Nor does petitioner cite a decision of any other court that addresses that question under 33 U.S.C. 1319(g)(8)(B). Accordingly, this Court should decline petitioner's request that it address the issue in the first instance. See, *e.g.*, *United States* v. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. 1711, 1719 (2001); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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